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William Mitchell Law Review

Volume 11 | Issue 3 Article 7

1985

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Recommended Citation
(1985) "The Constitutionality of Minnesota's New Corporate Takeover Act: The Cardiff Failure [Cardiff Acquisitions, Inc. v. Hatch, 751 F2d 906 (8th Cir. 1984)]," *William Mitchell Law Review*: Vol. 11: Iss. 3, Article 7.
Available at: http://open.mitchellhamline.edu/wmlr/vol11/iss3/7

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COMMENT

THE CONSTITUTIONALITY OF MINNESOTA'S NEW CORPORATE TAKEOVER ACT: THE *CARDIFF* FAILURE

[*Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984)]

INTRODUCTION

The United States Supreme Court's 1982 decision in *Edgar v. MITE Corp.*[1] seemed like the death knell for state corporate takeover statutes. Since *MITE*, state and federal courts have struck down twelve of the thirty-seven state statutes[2] regulating takeovers.[3] Fearing that its statute might suffer the same fate, Minnesota revised chapter 80B of the Minnesota Statutes, the state's corporate takeover statute.[4]

1. 457 U.S. 624 (1982). *See generally The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62 (1982) (discussing state takeover statutes) [hereinafter cited as *1981 Term*].

2. For a list of these statutes, see 3B H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 13.34[3] n.1 (rev. perm. ed. 1984); Profusek & Gompf, *State Takeover Legislation After* MITE: *Standing Pat, Blue Sky, or Corporation Law Concepts?*, 7 CORP. L. REV. 3, 5-6 n.16 (1984); Sargent, *On the Validity of State Takeover Regulation: State Response to* MITE *and* KIDWELL, 42 OHIO ST. L.J. 689, 690 n.7 (1981).

3. *See, e.g.*, Mesa Petroleum Co. v. Cities Serv. Co., 715 F.2d 1425 (10th Cir. 1983) (Oklahoma statute violated commerce clause as an unreasonable restraint on tender offers); Telvest, Inc. v. Bradshaw, 697 F.2d 576 (4th Cir. 1983) (amended Virginia statute that is not limited to Virginia residents imposes undue burden on interstate commerce); Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982) (Michigan statute imposes impermissible burden on interstate commerce); National City Lines, Inc. v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982) (Missouri takeover statute invalid under commerce clause and certain provisions held invalid under supremacy clause); Bendix Corp. v. Martin-Marietta Corp., 547 F. Supp. 522 (D. Md. 1982) (Maryland statute violates commerce clause and supremacy clause); Esmark, Inc. v. Strode, 639 S.W.2d 768 (Ky. 1982) (Kentucky statute violates commerce clause); Sharon Steel Corp. v. Whaland, 124 N.H. 1, 466 A.2d 919 (1983) (New Hampshire statute imposes indirect burden on interstate commerce). *But see* Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029 (1st Cir. 1982) (proper action for federal courts to abstain from ruling on constitutionality of Massachusetts takeover statute).

4. *See* Act of Apr. 25, 1984, ch. 488, 1984 Minn. Laws 470 (codified at MINN. STAT. §§ 80B.01-.13 (1984)). Subdivision 2(4) indicates that one of the purposes of the 1984 Act is "to conform with requirements suggested by decisions of the Supreme Court of the United States." 1984 Minn. Laws at 471.

In 1982, Ohio became the first state to enact legislation designed to conform to the Supreme Court decision in *MITE*. Kreider, *Fortress Without Foundation? Ohio Takeover Act II*, 52 U. CIN. L. REV. 108, 108 (1983). For a description and analysis of the so-called second-generation statutes, see Sargent, *Do the Second-Generation State Take-*

Published by Mitchell Hamline Open Access, 1985

In *Cardiff Acquisitions, Inc. v. Hatch,*[5] the Eighth Circuit upheld the constitutionality of chapter 80B,[6] becoming the first court since *MITE* to uphold a state takeover statute.[7] *Cardiff* signals the potential resurgence of state takeover statutes.[8] Relying on *Cardiff,* other states will likely adopt legislation similar to 80B.[9]

The legislative history of 80B reveals antipathy toward takeovers,[10] especially hostile ones.[11] Sponsors of 80B equated hostile

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over Statutes Violate the Commerce Clause?, 8 CORP. L. REV. 3 (1985); Steinberg, *State Law Developments: The Pennsylvania Anti-Takeover Legislation,* 12 SEC. REG. L.J. 184 (1984).

The 1985 Minnesota legislature is currently considering amending the Minnesota takeover statute to conform with *Cardiff Acquisitions, Inc. v. Hatch,* 751 F.2d 906 (8th Cir. 1984). H.F. No. 916, 74th Minn. Leg., 1985 Sess. [hereinafter cited as H.F. No. 916]. For a discussion of proposed changes, see *infra* notes 96, 162, 167.

5. 751 F.2d 906 (8th Cir. 1984).

6. *Id.* at 909.

7. *See* Inskip, *Efforts to fight hostile business takeovers,* Minneapolis Star & Trib., Jan. 9, 1985, at 21A, col. 1.

8. The significance of this holding has not been missed by the local legal community. Two legal education conferences held shortly after the *Cardiff* decision focused on the local and national impact of *Cardiff. Hostile Takeover Mechanics and Defenses—Minnesota and New York Style (With U.S. Senate Perspectives)* (Minnesota Institute of Legal Education, March 1, 1985); *Corporation, Banking and Business Law Section Midwinter Conference* (Minnesota CLE, Feb. 8-9, 1985).

9. An attorney representing the sponsors of chapter 488 predicted that Minnesota's takeover statute would be the model for other states designing takeover statutes. Gold, *Minnesota takeover law passes appeals test,* St. Paul Pioneer Press, Nov. 30, 1984, at 6D, col. 1.

10. The terms "takeover offer" and "tender offer" are frequently used interchangeably. *See MITE,* 457 U.S. at 626 n.1. "A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." *Id.* (quoting Note, *The Developing Meaning of 'Tender Offer' under the Securities Exchange Act of 1934,* 86 HARV. L. REV. 1250, 1251 (1973)). An offer generally "consists of a bid by an individual or group to buy shares of a company—usually at a price above the current market price. Those accepting the offer are said to tender their stock for purchase." H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2811; *see* Note, *Defining Tender Offers: Resolving a Decade of Dilemma,* 54 ST. JOHN'S L. REV. 520 (1980). Commenting on the lack of a clear definition of "tender offer," one authority has commented that tender offers, "like obscenity, [are] recognizable on sight." H. BLOOMENTHAL, *supra* note 2, at § 13.24.

11. Tender offers have also been characterized as "raids" in which the offeror pays a premium for a working majority of shares in order to "loot" the firm to the detriment of the minority shareholders. The work of raiders is expressed in the statement by Senator Harrison Williams commenting on an earlier version of the Williams Act: "In recent years we have seen proud old companies reduced to corporate shells after white-collar pirates have seized control with funds from sources which are unknown in many cases, then sold or traded away the best assets, later to split up most of the loot among themselves." 111 CONG. REC. 28,257 (1965).

Another version of raiding is called "green mailing." *See, e.g.,* Crock, *Corporate Raiders and Their Targets: Making The Fight Fairer,* BUS. WK., Apr. 2, 1984, at 29. Crock describes green mailing as:

Wall Street slang for extortion via the threat of hostile tender offer, and it takeovers with murder and pillaging.[12] The revised statute attempts to mitigate such destruction by requiring offerors in takeovers to fully disclose their intentions.[13]

While chapter 80B withstood its initial constitutional challenge in *Cardiff,*[14] it remains infirm. The *Cardiff* court's attempt to distinguish 80B from previously invalidated state regulations is unpersuasive. A thorough analysis of *MITE* and lower court decisions applying *MITE* exposes flaws in the *Cardiff* decision and constitutional shortcomings in 80B.

In addressing the flaws of *Cardiff,* this Comment briefly reviews the history of tender offer legislation, highlighting Minnesota's previous takeover statute. Part I discusses the constitutionality of state takeover statutes, focusing on the analysis in *MITE.* The author reviews the impetus for Minnesota's new takeover regulation, in addition to the regulation's mechanics. Parts III and IV discuss the *Cardiff* court's misapplication of *MITE* and *MITE's* progeny.

> seems to be the financiers' fad of 1984. Executives read any purchase of a large chunk of their company's stock by a well-heeled outsider as a warning: 'Buy my stock back at a premium, or I'll launch a takeover.' In response, companies are spending huge sums to repurchase shares, sometimes failing to distinguish whether a threat is a heavy-handed tactic to reap a quick profit, the opening salvo in a real corporate raid, or simply an investment.

Id.

12. *House Commerce and Economic Development Committee: Small Business,* March 31, 1984 (statement of Ray Plank, Co-Chairman of Board of Directors of Minnesota Wellspring) (audio tape) [hereinafter cited as *Small Business*]. Military metaphors are often used in discussion of tender offers. *See* Gilson, *The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept,* 34 STAN. L. REV. 775, 775 n.1 (1982). "The tactical history of the tender offer movement resembles an unrestrained arms race." *Id.* at 775.

The legislative hearings are notable for their lack of substantive discussion of the bill's mechanics. The general impression, stated by the bill's sponsor in the House was that "[r]eading corporate statutes is about as exciting as watching paint fade." *See Small Business, supra* (comment of Wayne Simoneau, Committee Chairman).

13. Inskip, *supra* note 6, at 21A, col. 1.

14. A month prior to the *Cardiff* litigation, a New Jersey firm brought suit in federal district court to have chapter 80B invalidated. Scientific Computers, Inc. v. Edudata Corp., Civ. No. 4-84-978, slip. op. (D. Minn. Oct. 24, 1984). The target and offeror eventually reached an out-of-court settlement putting an end to the litigation. St. Anthony, *Edudata, Scientific Computers reach agreement,* Minneapolis Star & Trib., Oct. 26, 1984, at 5B, col. 1.

A memo from the Minnesota Attorney General's office disclosed to the sponsors of chapter 488 that the bill retained some of the specific provisions the *MITE* court found invalid. State of Minnesota, Office of the Attorney General, Technical Comments on H.F. No. 1422—Amending Corporate Takeover Act, Minn. Stat. ch. 80B (1982) (March 5, 1984) (Barry R. Greller, Special Assistant Attorney General) (on file at William Mitchell Law Review Office).

I. BACKGROUND TO *CARDIFF*

During the 1960's, substantial pressure developed for change in the securities laws to deal with takeover bids and tender offers.[15] Advocates of change argued that shareholders of target companies deserved more extensive information about the offeror and its plans for the target company.[16] Added disclosure would permit shareholders to make more informed decisions about tendering their stock.[17] Stricter disclosure would also discourage, or at least expose, offers made by "raiders."[18]

A. *The Williams Act*

Congress responded to the pressure for greater regulation of tender offers by adopting the Williams Act in 1968.[19] Courts have

15. During that period there was a great increase in the number of cash tender offers. "The factor most directly responsible for the swell in the number of cash tender offers was the presence of rigid pre-acquisition filing requirements [for other types of acquisitions] and the absence of any in the case of the cash tender offer." Note, *supra* note 10, at 520-21 n.4. Exchange offers, where the bidder offers to exchange its security for a share of the target owned by individual shareholders, are regulated by the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982). *See* Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered,* 88 YALE L.J. 510, 512 n.15 (1979).

16. Advocates advanced three major justifications for more extensive disclosure requirements. *See* Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers,* 57 TEX. L. REV. 1, 10 (1978). First, shareholders need parity of information with the offeror. *See id.* at 10-15. The second justification was to eliminate the anomaly that disclosure requirements existed in other control-transfer situations, such as the exchange offer and proxy contest, but not the cash tender offer. *See id.* at 15-17. The third justification was to protect the corporation against corporate raiders. *See id.* at 17-18.

17. *See* Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock,* 22 BUS. LAW. 149, 150 (1966). Cohen argues that disclosures by the offeror are "necessary if public investors are to stand on an equal footing with the acquiring person in assessing the future of the company and the value of its shares." *Id.*

18. For a discussion of the term "raiders," see *supra* note 11. While the notion of raiders is generally accepted, some commentators disagree with this concept. *See, e.g.,* Fischel, *supra* note 16, at 17-18.

> Empirical evidence suggests that only a small percentage of tender offers are made for the purpose of liquidating the assets of the target. Moreover, tender offers that are made for this purpose should not necessarily be discouraged. If the liquidation value of an enterprise is greater than its going concern value, the tender offeror renders an economic benefit by liquidating its assets.

Id. at 18.

19. 15 U.S.C. §§ 78(i), 78m(d)-(e), 78n(d)-(f). Courts have concluded that the Williams Act was designed to close the gap in the disclosure requirements of the federal securities laws by bringing cash tender offers, which previously stood virtually unregulated, within the ambit of federal securities regulation. *See, e.g.,* MITE Corp. v. Dixon, 633 F.2d 486, 492 (7th Cir. 1980), *aff'd sub nom.* Edgar v. MITE Corp., 457 U.S. 624 (1982).

interpreted the Act's legislative history as demonstrating Congress' commitment to a policy of neutrality in takeover battles.[20] This neutrality policy is based on congressional recognition that tender offers often benefit investors.[21] An act preventing tender offers by favoring incumbent management would harm rather than protect investors.[22]

The Williams Act requires a person or corporation that becomes the owner of five percent or more of a target's equity securities to file certain information with the Securities and Exchange Commission (SEC) and the target company.[23] Under the Act, purchasers must disclose their background and the source of funds used in making the purchase.[24] They must also disclose the purpose of the acquisition and any possible plans for major changes in the operation or structure of the target company.[25]

These disclosure requirements are designed to fulfill the purpose of the Williams Act—shareholder protection.[26] To achieve this pur-

20. *National City Lines,* 687 F.2d at 1129; Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1276 (5th Cir. 1978), *rev'd sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979). The Williams Act achieves neutrality by favoring neither management nor the offeror. *See MITE,* 457 U.S. at 633. This policy has been described as one of evenhandedness. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 31 (1977).

21. *See MITE,* 457 U.S. at 633. The neutral stance of the Williams Act "represented a conviction that neither side in the contest should be extended additional advantages vis-a-vis the investor, who if furnished with adequate information would be in a position to make his own choice." *Id.* at 633-34.

22. One of the Court's major concerns was that the Act not unduly delay the tender offer. *See MITE,* 457 U.S. at 637-39. Delay in the process has been characterized as "the most potent weapon in a tender offer fight . . . ." Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency,* 62 CORNELL L. REV. 213, 238 (1977). When passing the Williams Act, "Congress itself 'recognized that delay can seriously impede a tender offer' and sought to avoid it." *MITE,* 457 U.S. at 637 (quoting *Kidwell,* 577 F.2d at 1277). According to the SEC, delay permits the offeree to: "(1) repurchase its own securities; (2) announce dividend increases or stock splits; (3) issue additional shares of stock; (4) acquire other companies to produce an antitrust violation should the tender offer succeed; (5) arrange a defensive merger; (6) enter into restrictive loan agreements; and (7) institute litigation challenging the tender offer." *Id.* at 638 n.13 (quoting Brief for Securities and Exchange Commission as Amicus Curie at 10 n.8). For a discussion of the harm caused by these delays, see Fischel, *supra* note 16, at 30-40.

23. Securities Exchange Act of 1934, §§ 13(d)-(e), 14(d)-(f), 15 U.S.C. §§ 78m (d)-(e), 78n(d)-(f) (1982).

24. *Id.* §§ 13(d)(1), 14(d)(1), 15 U.S.C. §§ 78m(d)(1), 78n(d)(1). For a discussion of the filing requirements, see H. BLOOMENTHAL, *supra* note 2, § 13.26.

25. Securities Exchange Act of 1934, §§ 13(d)(1), 14(d)(1), 15 U.S.C. §§ 78m(d)(1), 78n(d)(1). For a critical analysis of the requirement that an offeror disclose its plans, see Fischel, *supra* note 16, at 13-14; Grossman & Hart, *Disclosure Laws and Takeover Bids,* 35 J. FIN. 323, 327-33 (1980).

26. Aside from disclosure requirements, the Williams Act contains other substantive protections. Stockholders who tender their shares may withdraw them during the first seven days of a tender offer and if the offeror has not yet purchased their

pose, Congress adopted a market approach designed to "get information to the investor by allowing both the offeror and incumbent managers of a target company to present fully their arguments and then let the investor decide for himself."[27] This approach gives shareholders a fair opportunity to make their decision based on the relevant facts.[28]

B. State Regulation

Companies fearing takeovers lobbied state legislatures, seeking greater protection than the Williams Act afforded.[29] State legislatures responded to these efforts by enacting their own takeover statutes.[30] The Minnesota legislature responded in 1973, becoming the fifth state to enact a takeover statute.[31] By the late 1970's, a total of thirty-seven states had their own takeover statutes.[32]

Minnesota's original takeover statute[33] was typical of first-generation takeover legislation.[34] The statute defined a tender offer as an acquisition of more than ten percent of a target company's equity security.[35] A target company included one organized under Minne-

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shares, at anytime after 60 days from the commencement of the offer. *See* 15 U.S.C. § 78n(d)(5). The seven-day withdrawal period contained in the Williams Act has been extended to 15 days by the SEC. Securities Exchange Act of 1934, Reg. 14d-7(a)(1), 17 C.F.R. § 240.14d-7(a)(1) (1984). The Act protects the unsophisticated by providing that an offeree may withdraw his or her shares. *See* H. BLOOMENTHAL, *supra* note 2, § 13.28[1][a]. Further, all shares tendered must be purchased for the same price. *See* 15 U.S.C. § 78n(d)(7). If the offering price is increased, those who have already tendered receive the benefit of the tender. *Id.*

The Williams Act also protects investors by providing that when the number of shares tendered exceeds the number of shares sought in the offer, those shares tendered during the first 10 days of the offer must be purchased on a pro rata basis. *Id.* § 78n(d)(6). For a discussion of pro rata taking, see H. BLOOMENTHAL, *supra* note 2, § 13.28[1][b].

27. *Kidwell,* 577 F.2d at 1276; *see National City Lines,* 687 F.2d at 1129; *see also Piper,* 430 U.S. at 35; Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975). For an argument that the Act fails in its purpose, see Fischel, *supra* note 16, at 24-26.

28. *Kidwell,* 577 F.2d at 1276-77.

29. *See* Profusek & Gompf, *supra* note 2, at 5.

30. *Id.* & n.16. For a listing of the various state acts, see H. BLOOMENTHAL, *supra* note 2, § 13.34[3] n.1.

31. Act of May 18, 1973, ch. 331, 1973 Minn. Laws 670 (codified as amended at MINN. STAT. ch. 80B (1985)); H. BLOOMENTHAL, *supra* note 2, § 13.34[1]. In 1968, Virginia became the first state to adopt a tender offer statute. *Id.* Nevada and Ohio adopted statutes in 1969, and Wisconsin followed in 1971. *Id.*

32. *See id.* & n.4. Although differences exist between the statutes, "there is enough of a common pattern to suggest that the rapid proliferation was the result of an organized effort to have the legislation adopted." *Id.*

33. *See* MINN. STAT. §§ 80B.01-.13 (1982).

34. For a discussion of the characteristics of typical takeover statutes, see Langevoort, *supra* note 22, at 219-38; Profusek & Gompf, *supra* note 2, at 6-8.

35. *See* MINN. STAT. § 80B.01, subd. 8 (1982).

sota law, or one having its principal office in the state and having a substantial portion of assets located in Minnesota.[36]

Minnesota's original takeover statute shared other similarities with typical first-generation takeover statutes. Like most statutes, Minnesota's contained preoffer filing and notification requirements.[37] The statute also permitted the commissioner of commerce to call a hearing if necessary for the protection of resident shareholders or if requested by target management or ten percent of the shareholders.[38] In addition, the commissioner was empowered to rule on the substantive fairness of the offer.[39] These aspects of state regulation extended the tender offer process for a longer period than under federal regulation,[40] and undermined first-generation takeover statutes.[41]

C. *The* MITE *Decision*

In *Edgar v. MITE Corp.*, the United States Supreme Court held that

36. *Id.*, subd. 9 (1982).

37. *See id.* § 80B.03, subd. 4. The majority of takeover statutes had substantial preoffer filing and notification requirements, ranging from 10 to 60 days. *See* Langevoort, *supra* note 22, at 227. "During the period between the filing of the required statement and the beginning of the actual offer, the target company can execute defensive maneuvers . . . ." *Id.* Also, the market price of the target company often rises during the waiting period, thus reducing the value of the offeror's premium. *Id.* Activities by arbitrageurs have the effect of raising the market price.

> Arbitrageurs purchase shares of stock subject to a tender offer on the open market at the lower market price in the hope of then tendering at the higher offer price. In doing this, they assume the risk that, for some reason, some or all of the tendered shares will not be accepted by the offeror. The increased demand for shares generated by the arbitrage activity places an upward pressure on the market price of the stock. As a result, the difference between the offer and the market price is reduced—as is the incentive to tender.

Id. at n.95.

38. *See* MINN. STAT. § 80B.03, subds. 4-5 (1982). In a typical statute,

> The hearing is designed to determine whether the offeror has made 'full and fair disclosure.' Under this standard, a hearing officer could conceivably look at the adequacy of disclosure not only for the reasonable investor, but also for the 'ethical' investor or naive investor. If the disclosure meets the statutory standards, the hearing officer must approve the offer; if it does not, he may require such additional disclosure as is deemed necessary to bring the offer into compliance with the statute.

Langevoort, *supra* note 22, at 232 (footnotes omitted).

39. *See* MINN. STAT. § 80B.03, subd. 5 (1982). "If, upon the hearing, the commissioner finds that the takeover offer . . . is unfair or inequitable to offerees . . . he shall by order deny registration of the offer." *Id.*

40. Profusek & Gompf, *supra* note 2, at 8.

41. *See, e.g.*, *National City Lines*, 687 F.2d at 1130. The hearing and precommencement provisions in Missouri's statute upset "the congressionally designed balance by creating delay in the commencement and consummation of the tender offer." *Id.* "State statutes which can be used to unduly delay tender offers are preempted by the Williams Act." *Id.* at 1131.

the Illinois Business Takeover Act unconstitutionally burdened interstate commerce.[42] By closely scrutinizing the statute's validity, the Court dramatically limited state power to regulate tender offers.

MITE arose out of a tender offer made by the MITE Corporation, a Delaware corporation headquartered in Connecticut.[43] MITE announced a cash tender offer for the shares of Chicago Rivet, an Illinois corporation.[44] Although the Illinois takeover statute applied to the proposed offer, MITE did not comply with the statute. MITE instead filed suit in federal court[45] seeking a preliminary injunction against application of the Illinois statute to the proposed bid.[46] The district court issued the requested injunction, declaring that the Illlinois statute was preempted by the Williams Act and that it violated the commerce clause.[47] The Seventh Circuit affirmed.[48]

The United States Supreme Court affirmed the unconstitutionality of the Illinois statute.[49] Justice White wrote a plurality opinon[50] invalidating the Illinois statute on federal preemption grounds.[51] A majority, however, found the statute invalid because it imposed an indirect burden on interstate commerce.[52]

1. *Preemption Analysis*

In his plurality opinion, Justice White argued that the Illinois statute violated the supremacy clause[53] by frustrating the objectives of

42. *See MITE,* 457 U.S. at 646.

43. *See id.* at 626-27.

44. *Id.* at 627. Mite offered $28 per share, a four dollar per share premium over the prevailing market price. *Id.* at 628.

45. *See id.*

46. *Id.* MITE commenced an action in the United States District Court for the Northern District of Illinois on the same day the tender offer was made. *Id.* MITE sought a temporary restraining order and preliminary and permanent injunctions to prohibit the Illinois Secretary of State from enforcing the Act. *Id.* MITE also requested a declaratory judgment that the Illinois statute was preempted by the Williams Act and violated the commerce clause. *Id.*

47. *Id.* at 629; *see* MITE Corp. v. Dixon, 633 F.2d 486, 490 (7th Cir. 1980).

48. *MITE,* 633 F.2d at 488.

49. *MITE,* 457 U.S. at 646.

50. Justices Burger, Blackmun, O'Connor, Powell, Stevens, and White concluded that the case was justiciable. Justices Marshall, Brennan, and Rehnquist based their dissents on the issue of justiciability. Only Justices White, Burger, Blackmun, and Powell agreed that the Act was preempted. Justices White, Burger, Stevens, O'Connor, and Powell held that the statute was invalid under the commerce clause. For a summary of the allocation of the Justices' votes, see Casenote, *The Unsung Death of State Takeover Statutes:* Edgar v. Mite Corp., 24 B.C.L. REV. 1017, 1039-44 (1983). Two commentators referred to the decision as "deeply fractured." Profusek & Gompf, *supra* note 2, at 3.

51. *See MITE,* 457 U.S. at 634-40.

52. *See id.* at 643-46.

53. The supremacy clause of the United States Constitution provides: "The

the Williams Act. In regulating tender offers under the Williams Act, Congress established a careful balance between the interests of shareholders, incumbent management, and offerors.[54] Justice White concluded that the Illinois statute upset this balance by delaying the tender offer process to the advantage of incumbent management.[55] Moreover, the Illinois statute empowered the secretary of state of Illinois to stop offers he or she deemed unfair.[56] Such influence conflicted with Congress' intent that shareholders be free to make their own investment decisions.[57]

2. *Commerce Clause Analysis*

Writing for the majority, Justice White held that the Illinois statute violated the commerce clause by imposing a burden on interstate commerce which outweighed any local interests served by the statute.[58] In arriving at this conclusion, the Court applied the balancing

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Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

Under the supremacy clause, a state statute may be preempted by federal law in any of three ways. First, Congress may express a clear intention to preempt state law. Shaw v. Delta Air Lines, Inc., 103 S. Ct. 2890, 2899 (1983); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Second, Congress may indicate an intention to occupy an entire field of regulation, in which case federal law is exclusive. *See* Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Third, state law may directly conflict with federal law, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or "[stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 & n.20 (1941).

54. *See MITE,* 457 U.S. at 633-34. For a discussion of the balancing policy of neutrality, see *supra* notes 20-22 and accompanying text.

55. 457 U.S. at 634-39. Justice White relied on the fact that tender offers serve a useful purpose by providing a check on inefficient management. *Id.* at 633. Various commentators have argued that tender offers provide a beneficial check on incumbent management.

Justice White concluded that two provisions of the Illinois statute thwarted the policies of the Williams Act by introducing delay into the tender offer process. The two provisions were a preoffer notification requirement, *id.* at 635, and a hearing provision containing no deadline for completion of the hearing. *Id.* at 636-37.

56. *Id.* at 639.

57. *Id.* at 639-40. Such provisions provide "investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress." *Id.* at 640 (quoting *MITE,* 633 F.2d at 494). When the Williams Act was under consideration, the SEC did not even suggest that it be granted the authority to pass on the substantive fairness of a tender offer. *MITE,* 633 F.2d at 494 n.14.

58. 457 U.S. at 646. The majority found an indirect regulation of interstate commerce. *See id.* at 643. Only three justices (White, Stevens, and O'Connor) determined that the Illinois act purported to regulate interstate commerce directly. *See id.* at 641-43. In arriving at the conclusion that the Illinois statute directly burdened interstate commerce, Justice White distinguished the statute from state blue sky laws.

test established in *Pike v. Bruce Church, Inc.*[59]

Under the *Pike* test, state regulation that indirectly burdens interstate commerce will be upheld unless the burden is excessive in relation to putative local benefits. The majority found that the secretary's power to block a nationwide tender offer substantially burdened commerce and that any benefits to local interests were largely speculative.[60] Consequently, the balance tipped against the validity of the Illinois statute.

The *MITE* Court measured the substantial burden of blocking a nationwide tender offer against two purported state interests: the protection of resident security holders[61] and the regulation of the internal affairs of companies incorporated under Illinois law.[62] The majority acknowledged the state's legitimate interest in protecting resident shareholders, but found no such interest in protecting nonresident shareholders. To the extent the Illinois statute applied where none of the target's shareholders were state residents, there was no legitimate interest to weigh against the burden on interstate commmerce.[63]

Unlike blue sky laws, the Illinois statute regulated "transactions which take place across state lines, even if wholly outside the State of Illinois." *Id.* at 641. Justice White stated broadly that the commerce clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 642-43.

59. 397 U.S. 137, 142 (1970). The commerce clause grants Congress the power "[t]o regulate commerce . . . among the several States . . . ." U.S. CONST. art. 1, § 8, cl. 3. It is well established, however, that "the National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 140 (1973). The states "retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980). Thus when "activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in the absence of congressional guidance is called upon to make a 'delicate adjustment of the conflicting state and federal claims.' " Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976) (quoting H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 533 (1949) (Black, J., dissenting)). The *Pike* test provides more specific guidance for making these delicate adjustments. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142.

60. *See MITE,* 457 U.S. at 643-45.

61. *Id.* at 644-45.

62. *Id.* at 645-46.

63. *Id.* at 644. In the Court's words: "While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." *Id.*

The majority further discounted the state interest in protecting resident shareholders by labeling any protections to local shareholders as speculative.[64] Purporting to protect resident shareholders, the Illinois statute required disclosure beyond that mandated by the Williams Act. The Supreme Court agreed with the court of appeals[65] that "additional disclosures rather than allowing shareholders to make a more informed decision, may actually serve to confuse them and to obscure relevant information."[66] The additional disclosure also increased the potential for delay, thus enhancing incumbent management's ability to kill the offer.[67] On these grounds, the Court

64. *Id.* at 645.

65. *Id.*

66. *See Dixon,* 633 F.2d at 500. In Great W. United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979), the court said that "in the area of financial disclosure it can be true that 'less is more'. Disclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosures." *Id.* at 1280. Excessive disclosure requirements may provide management an opportunity to stifle a tender offer because some irrelevant matter has not been disclosed. *Id.*

67. *MITE,* 457 U.S. at 645. The Court was of the opinion "that the possible benefits of the potential delays required by the Act may be outweighed by the increased risk that the tender offer will fail due to defensive tactics employed by incumbent management." *Id.*

The solicitation of a takeover bid from a "white knight," a friendly offeror, is one of the most effective defensive tactics available to corporate management confronted with a hostile tender offer. *See generally* Fleischer & Sternberg, *Corporate Acquisitions,* 12 REV. SEC. REG. 937 (1979); Fraidin & Franco, *Lock-up Arrangements,* 14 REV. SEC. REG. 821 (1981); Kramer, *The Formulated Lock-Up: New Technique Emerges in Takeover Arena,* NAT'L L.J., Aug. 3, 1981, at 19, col. 3.

Other defensive tactics used by target management to respond to a tender offer include publicity campaigns against the bidder, litigation challenging the offer, acquisition of a company that creates antitrust obstacles for the unfriendly bidder, entrance into a defensive merger, issuance of additional shares of stock, repurchase by the target of its own shares, or announcement of a dividend increase or a stock split. *See generally* A. FLEISCHER, TENDER OFFERS: DEFENSES, RESPONSES AND PLANNING 113-55 (1978); 1 M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS ch. 6 (1984); Lipton, *Takeover Bids in the Target's Boardroom, An Update After One Year,* 36 BUS. LAW. 1017, 1027-28 (1981). For a discussion of these and other tactics, see E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 219-22, 227-76 (1973); E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 199-202 (1977).

Prior to the announcement of a tender offer, common defensive tactics (popularly known as "shark repellants") include amendments to the potential target's bylaws or certificate of incorporation to create a staggered board of directors, to eliminate cumulative voting, to provide for the sale of a class of preferred stock to friendly shareholders whose approval is required for extraordinary business transactions, or to require the approval of a supermajority of shareholders for removal of directors without cause prior to the expiration of their terms. Other methods include the establishment of a fair price requirement or formula pursuant to which an acquiror must compensate minority shareholders who are being squeezed out, or the creation of an employee stock ownership plan. *See generally* E. ARANOW & H. EINconcluded that the protections afforded resident shareholders were speculative.

The *MITE* Court was equally unpersuaded by the second asserted state interest of regulating the internal affairs of domestic corporations.[68] The majority reasoned that tender offers do not involve the internal affairs of the target company because the transfer of stock is between shareholders and a third party.[69] Moreover, the Illinois statute applied to corporations not incorporated in Illinois.[70] Applying the same reasoning it applied in discounting the state's interest in protecting nonresident shareholders,[71] the Court found that Illinois had no interest in regulating the internal affairs of businesses incorporated outside of Illinois.[72]

The *MITE* Court balanced these two purported state interests against the burden that blocking a nationwide tender offer places on interstate commerce.[73] The majority considered this burden substantial for three reasons.[74] First, it denied shareholders an opportunity to sell their shares at a premium.[75] Second, blocking tender offers thwarted efficiency and competition by hindering the realloca-

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HORN, *supra,* at 223-27, 259-66; E. ARANOW, H. EINHORN & G. BERLSTEIN, *supra,* at 193-99; 1 M. LIPTON & E. STEINBERGER, *supra,* §§ 6.02-.04.

68. *See MITE,* 451 U.S. at 645-46. This state interest is based on the fact that corporations owe their existence to state law. *See* Profusek & Gompf, *supra* note 2, at 29; *see also* Boehm, *State Interests and Interstate Commerce: A Look At The Theoretical Underpinning of Takeover Legislation,* 36 WASH. & LEE L. REV. 733, 743, 746 (1979); Sargent, *supra* note 2, at 724-27; Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 CASE W. RES. L. REV. 722, 740-45 (1970). For a discussion of this interest as it pertains to the 302A amendments, see *infra* note 206.

69. 457 U.S. at 645. Various commentators have agreed that this asserted state interest in regulating tender offers because of the internal affairs is unpersuasive. *See, e.g.,* Note, *Commerce Clause Limitations upon State Regulation of Tender Offers,* 47 S. CAL. L. REV. 1133, 1153-55 (1974).

70. 457 U.S. at 645. It also applied whether or not the principal place of business was in Illinois. *Id.*

71. *See supra* note 63 and accompanying text.

72. 457 U.S. at 645-46.

73. *Id.* at 643-46. The balancing test applied is derived from Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). For a discussion of the *Pike* test, see *supra* note 59 and accompanying text. Prior to *MITE,* the decisions invalidating state takeover statutes used varied language to describe the legitimacy of the putative local benefits. Courts have found the interests legitimate but "weak" or "tenuously served" by the particular statute. Crane Co. v. Lam, 509 F. Supp. 782, 789 (E.D. Pa. 1981); *see also Kidwell,* 577 F.2d at 1286 (uncertain protection for small percentage of shareholders). The putative interests have also been found to be of only incidental local character. Kennecott Corp. v. Smith, 507 F. Supp. 1206, 1223 (D.N.J. 1981).

74. *See* 457 U.S. at 643. The Eighth Circuit, in *Cardiff,* failed to consider the substantial effect of blocking a nationwide tender offer. *See infra* notes 150-54 and accompanying text.

75. 457 U.S. at 643. Suspension of MITE's offer would have deprived the target's shareholders of a four dollar per share premium. *Id.* at 628.

tion of economic resources to their highest valued use.[76] Third, it afforded protection to incumbent management, reducing their incentive to perform efficiently[77] and thereby maintaining high stock prices.[78] Emphasizing these factors, the majority held that the Illinois statute imposed a substantial burden on interstate commerce which unconstitutionally outweighed its putative local benefits.[79]

3. *MITE's Progeny*

Courts appraising the validity of state takeover statutes after *MITE* refused to make fine distinctions between the Illinois statute and the statute being tested.[80] Before *Cardiff,* the clear trend was for state

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76. *Id.* at 643. The idea of reallocation of economic resources to their highest valued use, in the context of tender offers, comes from Fischel, *supra* note 16, and Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer,* 94 HARV. L. REV. 1161 (1981). Fischel states:

> One of the factors that will be reflected in the price of a firm's securities in an efficient capital market is the capability of its current management. If a firm is poorly managed, the price of its securities will be lower than under more competent management, and the firm and society in general would benefit from a transfer of control to more capable managers.

Fischel, *supra* note 16, at 1-2. For a summary of the efficient capital market theory, see J. LORIE & M. HAMILTON, THE STOCK MARKET: THEORIES AND EVIDENCE 70-97 (1973).

77. 457 U.S. at 643. The Court's position was based on the following reasoning:

> The market for corporate control and the threat of cash tender offers in particular are of great importance in creating incentives for management to maximize the welfare of shareholders . . . . [I]nefficient performance by management is reflected in share price thus making the corporation a likely candidate for a takeover bid. Since a successful takeover bid often results in the displacement of current management, managers have a strong incentive to operate efficiently and keep share prices high.

Fischel, *supra* note 16, at 9. "The most probable explanation for unfriendly takeovers emphasizes their role in monitoring the performance of corporate managers. The tender bidding process polices managers whether or not a tender offer occurs, and disciplines or replaces them if they stray too far from the service of the shareholders." Easterbrook & Fischel, *supra* note 76, at 1169. Bloomenthal points out:

> As initially conceived, proposed legislation regulating tender offers was thought of as a means of protecting the target company against the outside raider. In the course of the legislative process, however, an awareness developed that tender offers were not all bad, in that such techniques made it possible to oust inefficient or otherwise ineffective management.

H. BLOOMENTHAL, *supra* note 2, § 13.28[2] (footnotes omitted).

78. 457 U.S. at 643.

79. *Id.* at 646.

80. *See* Mesa Petroleum Co. v. Cities Serv. Co., 715 F.2d 1425, 1430 (10th Cir. 1983); Telvest v. Bradshaw, 697 F.2d 577, 581-82 (4th Cir. 1983); *National City Lines,* 687 F.2d at 1131; Sharon Steel Corp. v. Whaland, 124 N.H. 1, 4-5, 466 A.2d 919, 921-22 (1983); Esmark v. Strode, 639 S.W.2d 768, 772-73 (Ky. 1982). According to the *Mesa* court:

> As the opinion in *MITE* makes clear, the Supreme Court was not concerned with the minutiae of the Illinois Act. Its central features, which the Oklahoma Act tracks in every particular, were the source of the constitu-

and federal courts to apply the *MITE* decision broadly.

The broad application of *MITE* by lower courts is exemplified by *National City Lines, Inc. v. LLC Corp.*[81] In *National City Lines,* the Eighth Circuit Court of Appeals scrutinized the disclosure requirements of the Missouri takeover statute. The statute mandated disclosure of "such additional information as the commissioner may require as necessary in the public interest or for protection of investors."[82] The *National City Lines* court reasoned that Congress, through the Williams Act, established what relevant facts were to be disclosed.[83] The court held that the statute was preempted to the extent that it attempted to second guess what facts were relevant.[84] Although *MITE's* preemption holding had the support of only three justices, the Eighth Circuit did not hesitate to invalidate the Missouri statute on that ground.[85]

Another example of a lower court's broad application of *MITE* is *Martin-Marietta Corp. v. Bendix Corp.*[86] In *Martin-Marietta,* the Sixth Circuit invalidated a Michigan takeover statute which applied only to Michigan residents[87] as an impermissible burden on interstate commerce.[88] According to the court, the statute burdened interstate commerce because it had the *effect* of depriving nonresidents from

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> tional infirmity. The Administrator's attempt to find minor variances between the provisions of the two acts is an essentially futile exercise. These variances, which involve such things as filing time and time within which a hearing must be held, fall within Judge Learned Hand's category of 'distinctions without a difference.'

Mesa Petroleum Co., 715 F.2d at 1430.

81. 687 F.2d 1122 (8th Cir. 1982).

82. *Id.* at 1131.

83. *See id.* at 1132.

84. *Id.* To support this proposition, the *National City Lines* court cited Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 171 (1963). *National City Lines,* 687 F.2d at 1132. *Paul* dealt with the validity of a California statute having more stringent oil content requirements for avocados than found under federal law. *See Paul,* 373 U.S. at 133-34. The majority upheld the state law, but in a strong dissent, Justice White stated that "when the appropriate federal regulatory agency adopts minimum standards which on balance satisfy the needs of the subject matter without disproportionate burden on the regulatees, the balance struck is not to be upset by the imposition of higher local standards." *Id.* at 171 (White, J., dissenting).

85. The *National City Lines* court stated the issue as follows: "In the absence of explicit or implicit preemption, the issue is whether under the circumstances of this particular case the Missouri Act stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in passing the Williams Act." *National City Lines,* 687 F.2d at 1129.

86. 690 F.2d 558 (6th Cir. 1982).

87. *Id.* at 567. In contrast, *MITE* invalidated a statute which applied whether or not the target's shareholders were state residents. *See supra* note 63 and accompanying text.

88. 690 F.2d at 567.

participating in nationwide tender offers.[89] Read broadly, *Martin-Marietta* precludes any application of state law to nationwide tender offers.[90]

D. Minnesota's New Takeover Statute

Attempting to circumvent *MITE,* the Minnesota Legislature amended the Minnesota corporate takeover law, chapter 80B, and the Minnesota Business Corporation Act, chapter 302A.[91] The amendments to Minnesota's tender offer statutes were also a response to legislative findings delineating the effect of takeovers on

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89. *Id.* The court argued that the statute:

> prevents Michigan shareholders from participating in the nationwide tender offer . . . . [T]his is an indirect burden on interstate commerce in that it has the effect of defeating the tender offers of the residents from other states where the tendered shares owned by Michigan residents are needed to provide sufficient tendered shares to satisfy the tender offer.

Id. The same argument applies to the Minnesota takeover statute. *See infra* notes 150-54 and accompanying text.

90. *See* Profusek & Gompf, *supra* note 2, at 26; *see also 1981 Term, supra* note 1, at 66 (effect on nationwide offer would result from any state takeover statute that significantly discouraged tender offers).

The broad application of *MITE* by lower courts is also illustrated by *Telvest,* 697 F.2d at 579. Like *Martin-Marietta, Telvest* focused on the effect takeover statutes have beyond state borders. *Id.* In *Telvest,* the Fourth Circuit invalidated Virginia's takeover statute even though it applied only to businesses incorporated under Virginia law. *Id.* at 579-80. In contrast, the Illinois statute invalidated in *MITE* applied to foreign corporations as well as local ones. *See supra* note 70 and accompanying text.

The *Televest* court's basis for invalidating the Virginia statute was that although the statute was limited to Virginia corporations, it was "not limited to transactions between residents of Virginia. In the instant case approximately 40 percent of the potential sellers of [the target's] stock are non-residents of Virginia. Indeed, Telvest, the prospective purchaser, is not a Virginia corporation, [and] has its principal office in Illinois." *Telvest,* 697 F.2d at 580.

The *Telvest* court also recognized an additional burden imposed by state takeover statutes. *Id.* The court considered an expert's testimony that investors will shy away from Virginia companies, "discouraged by the increased cost and uncertainty of investing" in Virginia corporations. *Id; see also* Fischel, *supra* note 16, at 28 (shares of corporate stock in states with statutes allowing incumbent managers to profit at the expense of shareholders would trade at a lower price). Consequently, corporations may choose to incorporate in states not having tender offer restrictions. *Id.* at 29.

91. Act of Apr. 25, 1984, ch. 488, 1984 Minn. Laws 470. Apparently, the old state takeover statute was never used. The feeling was that if it were "used to delay the registration of a takeover offer, the takeover offeror would undoubtedly immediately file suit in federal court requesting an injunction to restrain application of the Minnesota law, using the U.S. Supreme Court decision overturning the Illinois law as a precedent for a permanent injunction." Memorandum from Senate Counsel & Research to Sen. Jim Pehler, *Chapter 80B, Corporate Takeovers,* Feb. 16, 1984 (Dan McGowan, Senate Counsel) (on file at William Mitchell Law Review Office); *see also* Act of Apr. 25, 1984, ch. 488, § 1, subd. 2(4), 1984 Minn. Laws at 471. Subdivision 2(4) states that one of the purposes of the statute is to "conform with the requirements suggested by the decisions of the Supreme Court of the United States." *Id.*.

the local economy, the availability of capital, and the community generally.[92]

92. The legislative findings are prominently set out before the legislative purposes. Their presence is important because the "findings at [the] beginning of a statute [are] necessary to tell courts what the legislature believes is wrong." *See Small Business, supra* note 12 (statement by Wayne Simoneau).

The legislative findings delineate the consequences of takeovers. The first listed consequence of takeovers is that they "exaggerate the tendency of many businesses to focus on short-term performance to the detriment of such long-term societal interests as increased research and development, improved productivity, and the modernization of physical plant and employee capabilities." 1984 Minn. Laws at 470; *see* Lipton, *Takeover Bids in the Target's Boardroom,* 35 BUS. LAW. 101, 104-05 (1979). Lipton queries, "Whether the long-term interests of the nation's corporate system and economy should be jeopardized in order to benefit speculators interested not in the vitality and continued existence of the business enterprise in which they have bought shares, but only in a quick profit on the sale of those shares?" *Id.* at 104 (emphasis omitted). Lipton assumes that target companies are well run and have substantial amounts of cash from successful operations. For a criticism of this assumption see Fischel, *supra* note 16, at 7. Also, the determination "that acquired firms are well run does not exclude the possibility that, in new hands, the firms would be better run." Easterbrook & Fischel, *supra* note 76, at 1183. The mere fact that target companies are cash rich, implying successful operations, does not necessarily demonstrate that takeovers are undesirable. Easterbrook and Fischel argue, "To the contrary, that a firm holds a substantial cash position indicates [inefficiency]. Cash can be invested. The acquirer usually invests the cash it obtains in the takeover, thus putting idle resources to work." *Id.*

The legislative findings indicate that takeovers often "threaten the jobs and careers of Minnesota citizens and undermine the ethical foundations of companies, as when jobs are eliminated and career commitments to employees are breached or ignored." 1984 Minn. Laws at 471.

The bill's sponsors have noted that a company's success "and thus the jobs that they provide, are often contingent upon long-standing customer/supplier relationships, both nationally and within communities. Such relationships, nurtured over many years, provide a stability to the job climate which a takeover could well destroy." *See* SUMMARY OF S.F. 1975, TAKEOVERS—MINNESOTA'S SOLUTION, at 3 (copy of speech given by Wayne Simoneau on April 5, 1984) (on file at William Mitchell Law Review Office) [hereinafter cited as SUMMARY].

Another consequence mentioned in the findings is that takeovers "often result in plant closings or consolidations that damage communities dependent on the jobs and taxes provided by these plants." 1984 Minn. Laws at 471. Also, takeovers "not infrequently wipe out long-standing customer/supplier relationships and the stability and continuity which these relationships provide throughout society." *Id.*

It is interesting to note that William C. Norris, founder and chairman of Control Data Corporation, was a driving force in chapter 488's development. Norris stated that "the more creative employees of the acquired company are normally the first to resign. The original entrepreneurial team—the major job-creating resource of the smaller company—is dispersed and ultimately lost." Norris, *The Social Costs of Takeovers,* CORP. REP. MINN., Sept. 1983, at 46, 47.

The findings state that takeovers "all too often stifle, and ultimately destroy, the entrepreneurial, innovative spirit of creative individuals in independent firms." 1984 Minn. Laws at 471. The sponsors of the bill noted that:

> many recent takeovers have been accomplished through massive borrowings, with billions of dollars of scarce capital tied up, and millions more

1. Amendments to Chapter 80B

Minnesota's new regulatory scheme significantly changes the jurisdictional provisions of chapter 80B. A target company is defined as a corporation with at least twenty percent of its securities owned by Minnesota residents and having substantial assets in the state.[93] A takeover offer includes only offers to purchase target company securities from Minnesota residents.[94] Thus, 80B applies to tender offers made to shareholders residing in Minnesota where twenty percent of the target's shares are held by Minnesota residents and the target company has substantial assets in Minnesota.

If the above requirements are met, the offeror must disclose and file certain information with the commissioner of commerce.[95] Disclosure under 80B is expanded to include the offeror's intentions to: (a) change the location of the target's executive office or a material portion of its business activities; (b) change management or employment policies; or (c) significantly alter its relationship with suppliers, customers, or local communities.[96] Finally, the offeror is required to make "full disclosure . . . of all material information,"[97] including "other information which would affect the shareholders' evaluation of the acquisition."[98]

The commissioner of commerce is responsible for reviewing the

> often spent by the companies in the heat of the battle. The close connection between capital investment and jobs is well known, and in many situations, the nation's increasingly scarce capital could be more effectively applied in the interests of society rather than in empire building.

SUMMARY, *supra*, at 2. Harold Williams, former chairman of the SEC, argued that tender offers decrease welfare because they divert resources that otherwise could be used for capital investments and instead are used only to rearrange the ownership of existing corporate assets. Speech by Harold Williams before the Seventh Annual Securities Regulation Institute (Jan. 17, 1980), *reprinted in* [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,445, at 82,875. It has also been suggested that takeovers create monopolies. *See, e.g., Mergers and Economic Concentration: Hearings on S. 600 Before the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Judiciary Committee,* 96th Cong., 1st Sess. 61-106 (1979) (testimony of Assistant Attorney General John Shenefield).

93. MINN. STAT. § 80B.01, subd. 9 (1984). It is this 20% resident shareholder requirement that the *Cardiff* court relied on to distinguish Minnesota's takeover statute from the Illinois statute invalidated in *MITE*. *See infra* notes 131-34 and accompanying text.

94. MINN. STAT. § 80B.01, subd. 8.

95. *Id.* § 80B.03, subd. 1.

96. *Id.* subd. 6(c). The legislature is currently considering changing the language to require disclosure of "such other objective facts as would be substantially likely to affect a reasonable shareholder's evaluation of the take-over offer." H.F. No. 916, *supra* note 4, at 6.

97. MINN. STAT. § 80B.03, subd. 4(a). A failure to disclose all material information empowers the commissioner to suspend the offer until a hearing has been held.

98. *Id.*, subd. 6.

disclosure statement.[99] The commisioner may temporarily suspend the offer within three days of filing if the acquiring company fails to provide full disclosure.[100] Within ten days of suspension, a hearing must be held.[101] Based on this hearing, the commissioner determines whether the offeror has fully disclosed. The commissioner must make this determination no later than sixteen days after the suspension.[102] The commissioner may, however, prescribe time limits different than those specified.[103] If the commissioner finds that the offeror has failed to provide all material information, he or she will permanently suspend the offer subject to the offeror's right to correct disclosure.[104]

2. *Amendments to Chapter 302A*

The amendments to Minnesota's takeover laws also affect chapter 302A. The 302A amendments are triggered if four conditions exist. First, the target must be incorporated under Minnesota law.[105] Second, the target must have its principal place of business in Minnesota

99. *Id.*, subd. 5. A large portion of the *Cardiff* decision analyzes the nature and extent of the commissioner's power to seek full disclosure from the offeror. *See infra* note 125 and accompanying text.

100. MINN. STAT. § 80B.03, subd. 4(a).

101. *Id.*, subd. 5. The purpose of not adopting chapter 14 guidelines was to permit swifter handling of the hearing and review process. Interview with John F. Apitz, Assistant to the Minnesota Commissioner of Commerce (Oct. 4, 1984); *see Cardiff*, 751 F.2d at 911 (the statute might contemplate expedited hearings).

102. MINN. STAT. § 80B.03, subd. 5. Because the commission must decide whether or not to suspend the offer within three days of the information statement being filed, the entire review and hearing process is to be completed within 19 days.

103. *Id.* The statute provides, "The commissioner may prescribe different time limits than those specified . . . ." *Id.* For a discussion of the invalidity of this hearing provision, see *infra* notes 163-67 and accompanying text.

104. MINN. STAT. § 80B.03, subd. 5. The amendments to 80B also include a provision controlling the "two-tier" offer. The two-tier offer is also referred to as a "front-end loaded" offer. *See, e.g.*, Reiser, *Corporate Takeovers: A Glossary of Terms and Tactics*, CASE & COMM., Nov.-Dec. 1984, at 35, 40. In the typical two-tier situation the offeror "offers a generous amount in cash for a controlling stake in the target company, and then offers a lower amount, often in stock or debentures, for the remainder. The idea is to gain a controlling interest quickly by inducing major holders to tender their stock fast." *Id.* Chapter 80B requires the offeror, for a period of two years, to pay the same amount for any shares purchased during that period as was paid to those initially tendering their shares. *See* MINN. STAT. § 80B.06, subd. 7.

The constitutionality of the two-tier provision was challenged by the offeror in *Cardiff.* The court decided that the question did not present a case or controversy ripe for determination. *Cardiff*, 751 F.2d at 914. The two-tier provision does not take effect until after a tender offer has been successfully completed. Presumably, an offeror would not be in a position to challenge the provision until after the tender offer has been completed.

105. After the *Cardiff* decision, Conwed, the target company in the dispute, asked its shareholders to approve a proposal to change its state of incorportion from Delaware to Minnesota. *Conwed seeks reincorporation*, Minneapolis Star & Trib., Jan. 30,

or have substantial assets[106] located in the state.[107] Third, the target is required to have at least fifty shareholders.[108] Fourth, the purchase must result in the offeror owning ten percent or more of the target's voting stock.[109]

If these conditions exist, the offeror must deliver an information statement to the target containing disclosure analogous to that required under 80B.[110] The information statement is then forwarded to shareholders, along with the target company's recommendations concerning the proposed takeover.[111] The acquiring company is permitted to proceed only if the transaction is approved by a majority vote of all shares not owned by the offeror.[112] If the acquiring company fails to comply with 302A[113] it is not permitted to vote or sell its shares for one year.[114] During that one-year period, the target company may redeem these shares at book value or at the price at which the shares were acquired.[115]

1985, at 2M, col. 1. The proposal was motivated by the potential of other takeover attempts and the added protection from such attempts afforded by 302A. *Id.*

106. The phrase "substantial assets" is also an important jurisdiction trigger under the 80B amendments. *See supra* note 93 and accompanying text. 80B, prior to the chapter 488 amendments, required that a company have a "substantial portion of its assets" in Minnesota. *See supra* note 36 and accompanying text. The latter requirement has a clearer meaning and would be easier to apply than "substantial assets."

107. MINN. STAT. § 302A.011, subd. 39.

108. *Id.*

109. MINN. STAT. § 302A.671, subd 2(d). The 302A amendments apply to acquisitions of shares resulting in a new range of voting power. *Id.* The ranges are by successive increments of 10% up to a majority of voting shares. *See id.*

Consistent with legislative intent, the 302A amendments will have the effect of restricting the free transferability of shares of Minnesota-based corporations with over 50 shareholders. The amendments, however, also affect the fungibility of shares. Shares of a particular class of stock may be tainted based upon the status of their current owner, or the intended purchaser. Individuals, corporations, or lending instutions may hesitate to purchase additional shares in a Minnesota company's stock if the purchase results in a new range of voting power. For a similar criticism of Ohio's takeover statute, see Krieder, *supra* note 4, at 118.

110. MINN. STAT. § 302A.671, subd. 2. *Compare* MINN. STAT. § 80B.03, subd. 6 *with* MINN. STAT. § 302A.671, subd. 2(a)-(c), (e). For a discussion of disclosure requirements in chapter 80B, see *supra* notes 95-105 and accompanying text.

111. *See* SUMMARY, *supra* note 92, at 6.

112. MINN. STAT. § 302A.671, subd. 4(a)(1). Further, the tender offer transaction must be completed within 180 days of shareholder approval. *Id.*, subd. 4(a)(2). The shareholder approval vote must take place within 30 to 55 days after the information statement is received. *See id.*, subd. 3.

113. A corporation may elect in its articles not to be governed by the controls provided by the amendments to chapter 302A. *See id.*, subd. 1(a).

114. *Id.*, subd. 1(b).

115. *Id.* This provision has the potential for anomalous results. Suppose an offeror bids $12.00 for a company's stock with a book value of $10.00. If the offeror's purchase does not comply with chapter 302A, the corporation is permitted to redeem

II. THE *CARDIFF* DECISION

In *Cardiff Acquisitions,* the Eighth Circuit upheld the 80B amendments against a constitutional challenge. The amendments withstood attack on both supremacy and commerce clause grounds. In defense of 80B, the *Cardiff* court distinguished the takeover statutes invalidated in *MITE* and *National City Lines.*

The hostile takeover in *Cardiff* pitted the target company, Conwed Corporation, against the offeror, Cardiff Acquisitions, Inc. Conwed is a Delaware corporation with its principal place of business in St. Paul, Minnesota.[116] At least twenty percent of Conwed's securities are held by Minnesota residents and a majority of its employees work in the state.[117] Cardiff, the offeror, is a subsidiary of a Delaware corporation having its principal place of business in California.[118]

On November 4, 1984, Cardiff made a national cash tender offer for all of Conwed's outstanding shares.[119] The following day Cardiff filed a registration statement with the Minnesota Commerce Com-

the shares tendered at book value. The potential for such a result inhibits offerors from making bids to shareholders at a premium. *Id.*

116. Cardiff Acquisitions, Inc. v. Hatch, 597 F. Supp. 1493, 1495 (D. Minn. 1984). Conwed is a diversified manufacturer of specialized interior and industrial products. *Id.* Conwed was a tempting target because of its $11 million cash reserve. Meyers, *Conwed cash may be used in takeover,* Minneapolis Star & Trib., Nov. 6, 1984, at 7B, col. 3.

117. *Cardiff,* 597 F. Supp. at 1495. At the time of the tender offer Conwed had approximately 1250 shareholder accounts. *Id.* Approximately 1.8 million of Conwed's shares were outstanding. *Id.* These stocks were traded publicly over the counter. *Id.*

The majority of Conwed's 1500 employees worked at a plant located in Cloquet, Minnesota. *Id.* Because Cardiff's acquisition was to be accomplished by leverage, there was concern that the Cloquet plant would be sold off to repay Cardiff's debts. Cardiff's filing indicated that:

> Cardiff expects to become significantly more leveraged as a result of the Offer. Although Cardiff has not made any definitive determination as to the the source of funds for repayment . . . it is anticipated that such indebtedness will be repaid . . . from the proceeds of any dispositions of assets or businesses of [Conwed] . . . .

Cardiff, 751 F.2d at 915 (quoting Cardiff's 302A filing). The concern that the Cloquet plant would be sold was also based on prior dealings of Cardiff's parent corporation. Conwed claimed that Cardiff itself was victimized after being purchased by its parent. Meyers, *State Halts Offer for Conwed Shares,* Minneapolis Star & Trib., Nov. 9, 1984, at 15B, col. 2.

118. *Cardiff,* 597 F. Supp. at 1495. Cardiff is a wholly owned subsidiary of Cardiff Equities Corporation. *Id.* Cardiff Equities and its parent company, Leucadia, Inc., owned approximately 200,000 shares of Conwed's common stock and held options to purchase 100,000 additional shares. *Id.* Leucadia was a New York City insurance firm. Meyers, *supra* note 116, at 7B, col. 3.

119. 597 F. Supp. at 1495. To assure that Cardiff would be Conwed's majority shareholder, the offer required a minimum number of Conwed shares to be tendered. *Id.* The minimum tender offer, coupled with shares already owned by Cardiff and its parent, represented 51% of Conwed's outstanding shares. *Id.* The offer was

mission pursuant to 80B. Three days later the commissioner invoked 80B, summarily suspending Cardiff's offer on the grounds of inadequate disclosure.[120] Cardiff filed suit in federal district court, asking the court to enjoin enforcement of 80B.[121] Cardiff claimed that 80B violated both the commerce and supremacy clauses.[122] The district court dismissed Cardiff's complaint[123] and Cardiff appealed to the Eighth Circuit.

On appeal, Cardiff argued that 80B was invalid under *MITE* and *National City Lines.* The Eighth Circuit's three-judge panel, however, distinguished Minnesota's takeover statute from the statutes invalidated in those two cases.[124] In a limited holding, the court stated that 80B is not unconstitutional on its face.[125] According to the

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due to expire on December 4, 1984. *Id.* Cardiff began purchasing tendered shares on November 18, 16 business days after the tender offer. *Id.*

120. *Id.* at 1496.

121. *Id.* at 1494-95. The district court denied Cardiff's motion for a temporary injunction. *Id.* at 1495.

122. *See id.* at 1497-98.

123. *Id.* at 1500. The district court concluded that chapter 80B did not violate the commerce clause because it "imposes only incidental burdens on interstate commerce which are outweighed by the legitimate local interests that are protected by it." *Id.* at 1498. Regarding the supremacy clause, the district court held that chapter 80B "does not sufficiently conflict with the Williams Act so as to make compliance with both impossible or to frustrate the purposes of [the Williams Act]." *Id.* at 1500. In upholding chapter 80B from Cardiff's preemption challenge, the court applied the preemption analysis applied by the United States Supreme Court in Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973). In *Ware,* the Supreme Court stated that the "proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Id.* (citing Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963)).

124. *Cardiff,* 751 F.2d 906, 909-11; *see supra* notes 53-79, 81-85 and accompanying text (discussion of statutes invalidated in *MITE* and *National City Lines).*

125. *Cardiff,* 751 F.2d at 909-11. The remainder of the court's opinion focused on whether chapter 80B was constitutional as applied by the commissioner to Cardiff's offer. The commissioner's application of the statute was analyzed using the standards set out in MINN. STAT. § 80B.03. The court broke down its review of Commissioner Hatch's actions into four areas.

The first area reviewed pertained to the commissioner's requests for disclosure under MINN. STAT. § 80B.03, subd. 6(b). Subsection 6(b) requires disclosure of "the source and amount of funds or other consideration used or to be used in acquiring any equity security . . . and if any part of the acquisition price is or will be respresented by borrowed funds or other consideration, a description of the material terms of any financing arrangements." MINN. STAT. § 80B.03, Subd. 6(b).

The record indicated that Cardiff, a wholly owned subsidiary of Cardiff Equities, was a shell corporation which had a net worth of $5 million. *See supra* note 118 and accompanying text. Cardiff's disclosure statement indicated that its parent, Leucadia, Inc., had agreed to advance Cardiff funds to effect the estimated $30.5 million stock purchase. *Cardiff,* 751 F.2d at 915. The terms of Leucadia's advance, however, were not disclosed. *Id.* The disclosure also stated that Cardiff was negotiating with several banks for credit, but that none of them had made a firm commitment. *Id.* With such vague financing commitments, there was concern that Cardiff intended to court, it may be narrowly construed in a manner consistent with the Williams Act[126] and is not unduly burdensome to interstate

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liquidate portions of Conwed to finance the purchase. Meyers, *supra* note 116, at 5B, col. 1.

Based on Cardiff's financial disclosures, the court agreed with the commissioner that "no present stockholders of Conwed could possibly make an informed decision as to whether to retain or sell their stock." *Cardiff,* 751 F.2d at 915. The court held that Cardiff must disclose whether it had an agreement with Leucadia to obtain funds. *Id.*

The commissioner did receive criticism from the court regarding application of subdivision 6(c) of § 80B.03. Subdivision 6(c) requires disclosure of any plans an offeror may have for liquidating a target's assets. *See* MINN. STAT. § 80B.03, subd. 6(c). The commissioner noted in his order that Cardiff was likely to liquidate a substantial portion of Conwed's assets. *Cardiff,* 751 F.2d at 915. The court ruled that while Cardiff must disclose its plans to liquidate, it was improper for the commissioner to characterize what Cardiff's plans were. *Id.*

Cardiff's potential exposure to lawsuits was the second area considered by the court. Subdivision 2(c) of § 80B.03 requires an offeror to disclose "any material pending legal or administrative proceedings in which the offeror or any of the subsidiaries is a party." MINN. STAT. § 80B.03, subd. 2(c). Noting the various lawsuits pending against Cardiff's parent company and the apparent use of parent funding to finance the stock purchase, the commissioner requested Cardiff to disclose whether "any liability or 'trust' arrangement could be imposed on Conwed's assets." 751 F.2d at 916. The commissioner's request was improper for two reasons. First, the request went beyond disclosure of facts, requiring Cardiff to characterize and evaluate previous disclosures. *See id.* Second, it required Cardiff to make disclosures regarding "*potential* lawsuits or legal claims in pending suits which might only be asserted in the future." *Id.* (emphasis in original).

The third area reviewed by the court dealt with the commissioner's request for additional disclosure regarding Cardiff's treatment of minority shareholders. The commissioner requested Cardiff to disclose "the value and propriety" of its treatment of minority shareholders. *Id.* The *Cardiff* court ruled that such evaluations are to be made by a target's shareholder, not by the commissioner or Cardiff. *Id.*

The final area reviewed was the requested disclosure concerning Cardiff's intent to abide by the two-tier offer requirements of § 80B.06, subd. 7. *See supra* note 105 (discussion of two-tier offer requirements of § 80B.06, subd. 7). Cardiff's filing stated that a second-tier offer might not comply with the two-tier offer provision. *Cardiff,* 751 F.2d at 915. The commissioner's order required Cardiff to disclose in its information statement that any potential second-tier offer would not comply with the sanction against two-tiered offers found in § 80B.06, subd. 7. *Id.* The court found such a request improper because it required Cardiff to evaluate what might happen in the future if a two-tier offer were attempted. *Id.*

126. 751 F.2d at 909. As support for the power of states to regulate tender offers, the *Cardiff* court referred to specific language in the Williams Act. *Id.* at 912-13. Section 28(a) of the Williams Act, 15 U.S.C. § 78bb(a) (1982), provides, "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." *Id.*

The *Cardiff* court's reliance on this language as a basis for state regulation is subject to criticism. The legislative history of the Williams Act is devoid of any evidence indicating that Congress was even aware of state takeover regulations when the Act was passed. *See MITE,* 457 U.S. at 631 n.6; *Kidwell,* 577 F.2d at 1275; *see also* commerce.[127]

A. *Commerce Clause Analysis*

In holding that 80B is not an undue burden on interstate commerce, the court analyzed the statute in light of the provisions of the Illinois statute which the *MITE* Court indicated were significant burdens on interstate commerce. The court concluded that 80B contained none of the burdensome provisions found in the Illinois statute.[128] In contrast to the Illinois statute, 80B contains no precommencement notification requirement, permits only the commissioner to call a hearing, and provides an expedited suspension and hearing schedule.[129] Further, the Minnesota statute does not

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H. BLOOMENTHAL, *supra* note 2, § 13.34[5] (when Williams Act was passed, only Virginia had adopted takeover legislation and it had not yet become effective).

The proponents of chapter 80B argue that it is analogous to state blue sky laws, the constitutional validity of which has been settled since Hall v. Geiger-Jones Co., 242 U.S. 539 (1917). The Supreme Court's rationale for upholding blue sky laws was that they only regulated transactions within the regulating state. *Id.* at 557. The *Hall* Court reasoned that "the provisions of the law . . . apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed . . . they are only affected by the requirement of a license of one who deals in them *within* the State." *Id.* at 557-58 (emphasis in original). Chapter 80B's proponents contend that 80B is analogous to blue sky regulation since it regulates only security transactions taking place within Minnesota. Under the reasoning in *Hall,* chapter 80B should withstand attack. *See* Profusek & Gompf, *supra* note 2, at 24-27; *see, e.g.,* Pitt, *Hostile Tender Offers Now Omnipresent Fact of Life,* LEGAL TIMES, July 18, 1982, at 1, col. 3.

The *MITE* Court was unpersuaded by the blue sky analogy. The Illinois statute differed "substantially from state blue-sky laws in that it directly regulate[d] transactions which take place across state lines . . . ." *MITE,* 457 U.S. at 641. The Illinois statute could prevent offerors from making offers to target shareholders living outside Illinois. *See id.*

The blue sky analogy is an inappropriate justification for state takeover statutes because the two forms of regulation are very different. *See Kidwell,* 577 F.2d at 1276 n.41. Blue sky laws are intended to protect investors from "speculative schemes which have no more basis than so many feet of 'blue sky.'" *Hall,* 242 U.S. at 550. The effect of blue sky laws is to regulate the marketability of shares in the regulating state. As enacted by Congress, the Williams Act was intended to provide shareholders with sufficient information to aid them in determining whether to sell their shares to tender offerors. Tender offer regulations affect the transfer of shares, the marketability of which has already been determined pursuant to state blue sky laws. Invoking a blue sky regulation in a given state to prevent the sale of securities does not prevent the success of the issuance in the remainder of the nation. In contrast, preventing a tender offer in a given state may prevent the offer's success nationwide. *See infra* notes 152-54 and accompanying text.

127. *Cardiff,* 751 F.2d at 909-10.

128. *See id.* According to the court, "The Minnesota Act is materially different in scope and application from the Illinois Act at issue in *MITE.*" *Id.* at 909.

129. *Id.* at 910-11. For a discussion of these provisions in the Illinois statute, see *supra* notes 55-57 and accompanying text.

permit the commissioner to pass on the substantive fairness of the offer.[130]

The *Cardiff* court drew another distinction between the Illinois statute and 80B. The Illinois statute applied even where none of the target's owners resided in Illinois.[131] Because the Illinois statute established no connection between its application and residency, there were no local interests to be weighed against the burdens on interstate commerce.[132] Chapter 80B, however, applies only to Minnesota residents and only where twenty percent of the target's shares are owned by state residents.[133] Chapter 80B is therefore distinguishable because of the connection between its burden on interstate commerce and the state's interest in protecting resident shareholders.[134]

The *Cardiff* court also rejected Cardiff's argument that any protection provided to local investors by 80B's disclosure requirements are illusory.[135] The court reasoned that the additional disclosures aid

130. *See Cardiff,* 751 F.2d at 911.

131. *MITE,* 457 U.S. at 627. The Illinois statute applied if 10% of the target's shares were held by Illinois residents or if two of the following conditions were met: (1) the corporation's principal office is located in Illinois; (2) the corporation is organized under Illinois law; or (3) the corporation has at least 10% of its stated capital and paid-in surplus represented in Illinois. *Id.*

132. *See Cardiff,* 751 F.2d at 911. For a discussion of this aspect of the *MITE* decision, see *supra* note 63 and accompanying text.

133. *Cardiff,* 751 F.2d at 911. An additional requirement of chapter 80B is that the target have substantial assets located in Minnesota. *Id.; see supra* note 93 and accompanying text. Conwed met the threshold of a substantial asset holder. Nearly "three-fourths of Conwed's employees, most of its manufacturing facilities, all of its research and testing centers, and the beneficial holders of more than twenty percent of its stock reside in Minnesota." *Cardiff,* 751 F.2d at 911 n.4.

134. The Illinois statute was held invalid because it burdened interstate commerce without assuring that any Illinois shareholders would benefit. Chapter 80B avoids this pitfall by requiring that at least 20% of the target's shares be owned by Minnesota residents. Any burdens on interstate commerce can be balanced against the putative benefits to at least 20% of the target's shareholders.

While 80B creates a connection between its application and resident shareholders, the same cannot be said of the 302A amendments. *See infra* note 201 and accompanying text.

135. *Cardiff,* 751 F.2d at 911-12. Cardiff argued that any benefits were "illusory because most of the disclosures required by the Minnesota Act are already required by the Williams Act, and the additional disclosures serve no valid purpose." *Id.* at 911. Cardiff's position was that if disclosures required by 80B essentially parallel those provided by the Williams Act, the rights of resident shareholders are not enhanced. *See id.* The *MITE* Court's reasoning supports Cardiff's position. *See MITE,* 457 U.S. at 644-45.

Cardiff also argued that 80B burdens interstate commerce because of "the existence, enforcement and cost of complying with the Act . . . and because a suspension in Minnesota may discredit the tender offer nationwide." *Cardiff,* 751 F.2d at 911. The *Cardiff* court's failure to acknowledge chapter 80B's effect of discouraging nationwide offers is discussed *infra* at notes 150-54 and accompanying text.

resident investors in appraising the value of the tender offer.[136] In the court's opinion, the additional disclosure is justified because it is "primarily concerned with the impacts of the proposed takeover on Minnesota residents, including employees and suppliers."[137]

B. *Supremacy Clause Analysis*

Cardiff also based its constitutional challenge on the supremacy clause analysis adopted in *National City Lines.*[138] Cardiff asserted that 80B "conflicts with the Williams Act because it empowers the commissioner to review the adequacy of disclosures and to stop the tender offer if he determines that there has not been 'full disclosure . . . of all material information.' "[139] Under the analysis in *National City Lines,* Cardiff contended, such power violates the supremacy clause by allowing the commissioner to second guess the SEC.[140] The Williams Act authorizes the SEC to specify what data is material to aid an investor.[141] Cardiff argued that by permitting the commissioner to also specify what information is material, 80B entitles the commissioner to second guess the SEC.

Partially agreeing with Cardiff's contention, the court struck down two disclosure clauses in 80B.[142] The *Cardiff* court concluded that the invalid clauses were open-ended and could result in the disclosure of "irrelevant or confusing" information.[143] The court held, however, that overall the principal additional disclosure requirements in 80B—those requiring disclosure of the takeover's effect on the target company's operations, employees, suppliers and customers, and on the community—were valid.[144] The court held that these

136. *Cardiff,* 751 F.2d at 912.

137. *Id.* at 911. For a discussion of the usefulness of this disclosure, see *infra* notes 189-96 and accompanying text.

138. National City Lines, Inc. v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982). For a discussion of *National City Lines,* see *supra* notes 81-85 and accompanying text.

139. *Cardiff,* 751 F.2d at 913 (quoting MINN. STAT. § 80B.03, subd. 4a).

140. *Id.*

141. *See National City Lines,* 687 F.2d at 1132.

142. *See Cardiff,* 751 F.2d at 914. The two clauses invalidated were § 80B.03, subds. 2, 6. Subdivision 2 authorized the Commissioner to require "such additional information as the commissioner by rule prescribes" and subdivision 6 required the offeror to disclose such "additional information the commissioner may by rule prescribe."

143. 751 F.2d at 914.

144. *Id.* The court compared the broadness of 80B's disclosure requirements to the disclosure requirements of the Missouri statute invalidated in *National City Lines. See id.* at 913. The comparison showed Missouri's disclosure requirements to be "much broader and more open-ended than those of the Minnesota statute." *Id.* The major distinction between the disclosure requirements was that the Missouri statute "required disclosure of 'such additional information as the Commissioner may require as necessary in the public interest or for the protection of investors.' " *See id.*

requirements serve to "protect unique and legitimate interests of Minnesota shareholders."[145]

According to the *Cardiff* court, it is constitutionally permissible for the commissioner to review the adequacy of disclosure.[146] The commissioner's review remains valid "so long as he restricts himself to deciding whether sufficient facts have been disclosed to comply with specific disclosures required by [80B]."[147] This means that the commissioner's determination of inadequate disclosure must be tied directly to the specific disclosure requirements set out in the statute.[148] Furthermore, in reviewing disclosure the commissioner may not suspend an offer on the grounds that the quality of the facts alleged are unsatisfactory to him or her, nor may he or she force the offeror to make evaluative or judgmental disclosure.[149]

III. Discussion

A. MITE *and its Progeny Forgotten*

In *Cardiff,* the Eighth Circuit failed to follow the teachings of *MITE* and its progeny. As the *Cardiff* court noted, *MITE* held that "the Illinois Act imposes a substantial burden on interstate commerce which outweighs its putative local benefits. It is accordingly invalid under the Commerce Clause."[150] Under *MITE,* the Eighth Circuit is directed to balance the burdens placed on interstate commerce by the Minnesota takeover statute against any putative local benefits inuring to resident shareholders. The *Cardiff* court failed, however, to consider the substantial impact the Minnesota statute has beyond Minnesota.

The Minnesota takeover statute's impact on nonresidents arises where the commissioner suspends a tender offer, thereby preventing

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For a discussion of 80B's disclosure requirements, see *supra* notes 95-98 and accompanying text.

145. 751 F.2d at 914.

146. *See id.*

147. *Id.*

148. The specific disclosure requirements are set out in Minn. Stat. § 80B.03, subds. 2, 6(a)-(e). For a discussion of how the court failed to adequately limit the commissioner's power beyond that expressly provided in 80B, see *infra* notes 167-73 and accompanying text.

149. *Cardiff,* 751 F.2d at 914.

150. *See MITE,* 457 U.S. at 646, *noted in Cardiff,* 751 F.2d at 909. The district court did a better job of applying the balancing test than the Eighth Circuit panel. The district court identified at least two significant burdens imposed by chapter 80B. First, 80B effectively stops tender offers, thus preventing nonresident shareholders from selling their shares at a premium. *Cardiff,* 597 F. Supp. at 1497. Second, 80B will cause fewer tender offers to be made in Minnesota, thereby lessening the pressure on incumbent management to perform well. *Id.*

the offeror from soliciting or purchasing shares in Minnesota.[151] This may prevent the offeror from obtaining the number of shares necessary to complete the tender offer.[152] Nonresidents are consequently prevented from participating in a nationwide offer. Minnesota's commissioner of commerce, acting within the scope of 80B, thus has the power to kill a nationwide tender offer where the tender of shares owned by Minnesota residents is necessary to complete the tender offer.[153]

The Sixth Circuit, in *Martin-Marietta,* recognized the impact state takeover statutes have on nonresidents. Although the Michigan statute applied only to state residents, the *Martin-Marietta* court concluded that the statute unduly burdened interstate commerce because it prevented Michigan residents from participating in nationwide tender offers and thus defeated the tender offers of nonresidents where the shares of Michigan residents were needed to satisfy the tender offer.[154]

The *Cardiff* court failed to analyze this impact on nonresidents when applying the *MITE* balancing test. Like the Michigan statute, 80B applies only to state residents and has the effect of preventing nationwide tender offers.

The *Cardiff* court also failed to follow *MITE* by leaving intact the self-tender exemption in 80B. The self-tender provision exempts from coverage "[a]n offer by the issuer to acquire its own equity securities."[155] This exemption permits the target company to make a competing tender offer for its own stock without complying with the takeover statute.[156]

The Illinois statute invalidated in *MITE* had an identical exemp-

151. The statute provides that while a proceeding under 80B is pending, "no offeror may . . . acquire any equity securities in this state . . . ." MINN. STAT. § 80B.06, subd. 5.

152. Cardiff's offer was contingent on it owning 51% of Conwed's outstanding shares. 597 F. Supp. at 1495; *see supra* note 119 and accompanying text.

153. The commissioner consequently has a veto power over the tender offer even if it was enthusiastically endorsed by every other state. *See generally MITE,* 633 F.2d at 502 ("Where a number of states on various bases claim authority over a tender offer, any single state would have effective veto power over the offer even if it received the enthusiastic endorsement of all the other states").

154. *See Martin-Marietta,* 690 F.2d at 567; *supra* note 89; *see also* Occidental Petroleum Corp. v. Cities Serv. Co., [1982-83 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,063, at 95,043 (W.D. Okla. Dec. 20, 1982) (Oklahoma takeover act places unconstitutional burden on interstate commerce).

155. MINN. STAT. § 80B.01, subd. 8(c).

156. Conwed took advantage of this exemption. Conwed's board of directors authorized the purchase of 12% of the company's outstanding shares. Minneapolis Star & Trib., Nov. 28, 1984, at 4M, col. 1. The authorized purchase was intended to help defeat Cardiff's takeover attempt. *Id.*

tion.[157] The *MITE* Court recognized that such an exemption leaves investors to depend solely on protections available under federal securities law, protections viewed by Illinois as inadequate.[158] Such an exemption is at variance with an asserted legislative purpose of investor protection and undermines the state's justification for burdening interstate commerce.[159]

Likewise, the *National City Lines* court found the self-tender exemption "discriminatory," permitting issuers to avoid the filing requirements and administrative scrutiny of Missouri's takeover statute.[160] The self-tender exemption also disrupts "the neutrality essential to the proper operation of the market approach of protecting investors utilized by the Williams Act."[161] Ignoring both *MITE* and *National City Lines,* the *Cardiff* court failed to invalidate 80B's self-tender provision.[162]

The *Cardiff* court also failed to acknowledge the potential for delay under 80B's hearing provisions. Although 80B provides time limits for scheduling hearings, the commissioner is not bound by these limits and may extend them indefinitely.[163] The Illinois statute contained the same potential for delay.

Under the Illinois statute a decision was to be made within fifteen days of the hearing conclusion, but that period could be extended without limitation.[164] Justice White's supremacy clause analysis in *MITE* recognized that such potential for delay thwarted Congress' purpose in enacting the Williams Act by introducing extended delay into the tender offer process, providing incumbent management with a powerful device to thwart the takeover.[165] The enforcement agent's power to extend the hearing process tips the balance struck

157. *See MITE,* 457 U.S. at 644.

158. *Id.*

159. *Id.; see also Telvest,* 697 F.2d at 581 (exemption dilutes claim that benefit arises from further disclosure).

160. *National City Lines,* 687 F.2d at 1132-33.

161. *Id.*

162. Ironically, under the self-tender exemption Minnesota resident shareholders are protected only by the federal securities laws, protection described as "negligible" by chapter 80B's sponsor. *See Small Business, supra* note 11 (statement by Wayne Simoneau); *see also MITE,* 457 U.S. at 644 (protections afforded by federal securities laws viewed by Illinois as inadequate in other contexts).

The legislature is presently considering amending the self-tender exemption so that an issuer offering to acquire its own shares during the pendency of another's tender offer must comply with the provisions of Minnesota's takeover law. H.F. No. 916, *supra* note 4, at 2.

163. For a discussion of chapter 80B's hearing provisions, see *supra* notes 101-05 and accompanying text.

164. *MITE,* 457 U.S. at 637.

165. *See id.*

by Congress in favor of incumbent management.[166]

Under 80B, Minnesota's enforcement agent has the same potential to delay the tender offer. The *Cardiff* court, however, failed to acknowledge this potential. The court noted that the statute empowered the commissioner to establish "different" deadlines, and that in *Cardiff* the commissioner had not delayed the hearing date and had in fact offered to advance it.[167]

The *Cardiff* court also overlooked disclosure requirements[168] in 80B which are invalid under the Eighth Circuit's analysis in *National City Lines*. In striking down Missouri's statute, the *National City Lines* court noted that the SEC, under power granted by the Williams Act, has specified what information is material to investors.[169] Missouri's attempt to second guess the SEC's judgment by requiring additional information was thus invalid.[170] The *Cardiff* court followed the *National City Lines* analysis in striking down as open-ended provisions in 80B requiring disclosure of "additional information."[171] The *Cardiff* court left intact, however, disclosure requirements which are equally open-ended. Chapter 80B permits the commissioner to suspend a tender offer if the offeror fails to provide "full disclosure . . . of all material information" including "other information which would affect the shareholders' evaluation of the acquisition."[172] This re-

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166. *See id.* at 639. The Kentucky Supreme Court invalidated Kentucky's takeover statute, which set no time limits on the hearing. *See Esmark*, 639 S.W.2d at 772. The *Esmark* court found the *MITE* holding applicable where "the hearing provision with no time limit contains the possibility of delay which frustrates the neutral purposes of the Williams Act." *Id.*

167. *Cardiff*, 751 F.2d at 910-11. The court relied on the fact that in *Cardiff* and in Edudata Corp. v. Scientific Computers, Inc., 746 F.2d 429 (8th Cir. 1984), the only two cases in which chapter 80B has been applied, the hearings had been expedited. 751 F.2d at 910-11. The statute provides, however, that the hearing shall be scheduled "within ten calender days of the date of suspension." MINN. STAT. § 80B.03, subd. 5. For a discussion of the impact of delay, see *supra* notes 22, 55 and accompanying text.

A proposed amendment to subdivision 5 permits the commisioner to prescribe only time limits that are shorter than those specified in subdivision 5. H.F. No. 916, *supra* note 4, at 5.

168. For a discussion of the disclosure provisions struck down in *Cardiff*, see *supra* note 142 and accompanying text.

169. MINN. STAT. § 80B.03, subds. 4(a), 6(c). Within three days of the offeror's registration statement being filed the commissioner may summarily suspend the offer if the registration statement does not contain all information specified in § 80B.03, subd. (6)(a)-(e) or the offeree fails to provide full disclosure of all material information concerning the takeover offer. *Id.* § 80B.03, subd. 4(a). For a discussion of the specified disclosures in § 80B.03, subd. (6)(a)-(e), see *supra* notes 95-98 and accompanying text.

170. 687 F.2d at 1131-32.

171. *Id.*

172. *See Cardiff*, 751 F.2d at 914. Permitting the commissioner to pass on the adequacy of disclosure is arguably unconstitutional. Permitting the person charged with

quirement is no less open-ended than one requiring disclosure of "additional information" and encourages the commissioner to second guess federal disclosure law.[173]

B. *Protectionism*

The *MITE* court exposed the trend which might be established by states attempting to protect local industries. Justice White hypothesized that if Illinois were permitted to impose protective regulations, other states would follow.[174] Under this scenario, "interstate commerce in securities transactions generated by tender offers would be

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enforcement to determine whether a tender offer may proceed based on a finding that the offeror has not complied with the state's takeover statute is invalid under *Martin-Marietta:*

> We find that to the extent that the state statutes confer power on state authorities to interfere with the timing of an interstate tender offer made under the Williams Act, or to compel the revision of the solicitation or tender offer as a condition of proceeding, they impose an unconstitutional burden on interstate commerce.

Martin-Marietta, 690 F.2d at 565.

173. The legislative findings set out at the beginning of chapter 80B also encourage the commissioner to second guess the SEC. For a discussion of these findings, see *supra* note 92. The final legislative finding indicates that takeovers "are usually conducted in an atmosphere and pursuant to laws that do not provide a reasonable opportunity for affected parties to make informed decisions." Act of Apr. 25, 1984, ch. 488, 1984 Minn. Laws at 471.

174. *MITE,* 457 U.S. at 642. This portion of Justice White's opinion was joined by Chief Justice Burger and Justices Stevens and O'Connor. These justices agreed with Justice White that the Illinois statute was a direct restraint on interstate commerce. *Id.* One pre-*MITE* commentator predicted that the benefits afforded incumbent management by state regulation may "induce potential target corporations to reincorporate in regulating jurisdictions. . . . Moreover, other states may adopt tender-offer legislation in self-defense. As more states adopt such regulation, federal policy will be displaced, and thus become increasingly irrelevant." Langevoort, *supra* note 22, at 238-39. *But see* Fischel, *supra* note 16, at 29. "The advantage to a corporation of incorporating in a state without a state tender offer statute is that the corporation will be a more attractive investment opportunity and therefore will be able to compete more effectively in the capital market." *Id.; see also Telvest,* 697 F.2d at 580 (investment in Virginia companies would be discouraged by Virginia takeover statute).

For an extreme example of protectionism, see Langevoort, *supra* note 22, at 232 ("Louisiana has enacted the most 'parochial' of all the state statutes"). At least one commentator believes that state legislatures necessarily have in mind protection of local companies when enacting takeover legislation. *See* Sargent, *supra* note 4, at 31.

The SEC was also concerned over the proliferation of state legislation and the effect it would have on its own regulatory scheme:

> [A]s early as May 1976, then Chairman Roderick M. Hills was urging Congress to adopt legislation making it clear that the Williams Act preempts the area. Harold M. Williams, the current Chairman, reiterated this view in a February 15, 1980 letter to Senator Proxmire, stating: 'It is the Commission's view that, as a general matter, the regulation of tender offers calls for the application of a uniform, national law.'

H. BLOOMENTHAL, *supra* note 2, § 13.34[1], at 13-178.

thoroughly stifled."[175] In addition to having to comply with federal law, offerors would have to draft additional disclosure statements to comply with takeover laws of each state.[176] Moreover, each state has incentive to invoke the powers of its takeover statute or else lose jurisdiction over the offer. Notwithstanding these problems, the *Cardiff* court failed to acknowledge the Supreme Court's concern with the proliferation of state statutes and the potential stifling of tender offers.[177]

The *Cardiff* court's failure to consider the potential stifling of tender offers is inexplicable given 80B's protectionism. Chapter 80B's protectionist slant is manifested in a number of ways. First, the statute's objective is to alleviate the hardships resulting from takeovers.[178] These hardships include the loss of jobs and careers of Minnesota residents and the closing of Minnesota plants. The protection of jobs in Minnesota is a primary goal of Minnesota Wellspring, the organization that spearheaded the bill's passage.[179] Second, 80B contains a self-tender exception favoring issuers with sufficient ties to Minnesota over offerors.[180] Third, the power to in-

175. *MITE,* 457 U.S. at 642.

176. *See* H. BLOOMENTHAL, *supra* note 2, at § 13.34[3]. Bloomenthal discusses a case highlighting the potential problems faced by offerors attempting to satisfy the requirements of various state regulations:

> The attempt of Grant Metropolitan Ltd. . . . to acquire control of Liggett Meyers, Inc. . . . points up both the conflict between [federal law] and state law and the multiple threat of state regulation. No less than four state tender offer statutes were arguably applicable, and the target threatened to invoke tender offer legislation of additional states in its effort to block, or at least delay, the tender offer.

Id. § 13.34[3], at 13-183.

177. Rather than grapple with this issue, the *Cardiff* court, when justifying the additional disclosures of 80B, mentioned that the statute was not to be used "as a protectionist measure." *See Cardiff,* 751 F.2d at 912.

178. Representative Wayne Simoneau, the bill's sponsor in the Minnesota House of Representatives, when asked what the purpose of the new law was, responded, "We would argue that, unlike currency or precious metals, which move about and have a value attached to them, attached to the ownership of shares is a social responsibility to employees, customers, vendors, and to the community where the company exists." Minneapolis Star & Trib., Nov. 5, 1984, at 1M, 6M, col. 1. Another sponsor of the bill emphasized that the new statute would signal to the business community that Minnesotans were "protective of their entrepreneural concerns." *See Small Business, supra* note 11 (statement by Ray Plank). The sponsor intimated that the impression of a safe haven business climate was more important than substantive protections. *Id.*

179. *See* Brief of Amicus Curiae, Minnesota Wellspring, in opposition to Plaintiff's Application for Preliminary Injunction at 5, Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906 (8th Cir. 1983) [hereinafter cited as Minnesota Wellspring]. Minnesota Wellspring is a non-profit public policy organization. *Id.* Its members participated in developing Minnesota's takeover statute and worked closely with the legislature to secure passage of the bill. *Id.*

180. For a discussion of the self-tender exemption, see *supra* notes 155-62 and

voke 80B lies in the hands of the commissioner, a political appointee.[181] The commissioner is empowered by 80B to call and extend a hearing indefinitely. The offer is susceptible to the commissioner's suspension if he or she determines that disclosure has insufficiently informed Minnesota shareholders.[182] With these factors in mind, the chances of a successful hostile takeover bid by an outsider are slim.

Chapter 80B exemplifies the type of local protectionism which could lead to the proliferation of takeover statutes and the stifling of tender offers. Although Minnesota's statute does not require any business to remain in Minnesota,[183] its effect is to preserve local business and jobs by hindering tender offers. The *Cardiff* court not only failed to acknowledge the negative impact of 80B's protectionist slant, but also used the statute's protectionist underpinnings as grounds for upholding it.[184] In doing so, the *Cardiff* court ignored the Supreme Court's prescience and set the stage for the prolifera-

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accompanying text. The effect of this exemption is illustrated in the takeover battle between Conwed and Cardiff. Conwed was permitted, under the self-tender exemption, to purchase its own shares without being subject to 80B's interference. Cardiff, on the other hand, as an outsider with insufficient local ties, was subject to the requirements of 80B.

181. Minnesota Statutes § 45.012 provides that the commissioner of commerce is to be appointed by the governor pursuant to the authority granted by Minnesota Statutes § 15.06.

182. According to one commentator, in typical statutes:

> The hearing is designed to determine whether the offeror has made 'full and fair disclosure.' Under this standard, a hearing officer could conceivably look at the adequacy of disclosure not only for the reasonable investor, but also for the 'ethical' investor or naive investor. If the disclosure meets the statutory standards, the hearing officer must approve the offer; if it does not, he may require such additional disclosure as is deemed necessary to bring the offer into compliance with the statute.

Langevoort, *supra* note 22, at 232 (footnotes omitted).

183. The Supreme Court has dealt severely with state regulation protecting local businesses and jobs. Under the Supreme Court's interpretation of state regulation, a state law is invalid per se where the legislation constitutes "simple economic protectionism." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). "The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *Id.*

Statutes requiring business operations to be performed in the home state, when those operations can be performed more efficiently elsewhere, also impose a burden on commerce that is per se illegal. *See Pike,* 397 U.S. at 145.

184. *Cardiff* upheld chapter 80B partially on the grounds that its disclosure requirements protected Minnesota residents from the impact of federally regulated tender offers. *See Cardiff,* 751 F.2d at 912.

According to the Fifth Circuit in *Kidwell,* protectionist interests should not provide any basis for upholding state takeover regulation. The *Kidwell* court, addressing the validity of Idaho's state takeover law in preserving local business, concluded that the "law does not require any business to remain in Idaho; at worst, it hinders relocation. Nevertheless, the purpose of preserving local industry cannot support the legislation. Nor can the effect be ignored." *Kidwell,* 577 F.2d at 1282; *see* Sargent, *supra* tion of state takeover statutes.[185]

Aside from protecting the local economy, 80B also attempts to protect community lifestyles by insuring that investors are cognizant of the destructive impact resulting from takeovers.[186] The legislative findings providing impetus for the statute portray takeovers as damaging to the ethical foundations of companies, the stability provided by perennial customer-supplier relationships, and the entrepreneurial spirit.[187] The findings also indicate that takeovers lead to the erosion of a city's tax base.[188]

The disclosure requirements in 80B are designed to make resident shareholders aware of local issues[189] so that they will evaluate tender offers with local issues in mind. Contrary to the *Cardiff* court's belief that such disclosure will help resident investors in "appraising the value of a tender offer,"[190] the additional information will not aid shareholders in making what is essentially a financial decision.[191]

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note 4, at 31. The protection of local jobs is the type of "parochialism . . . the Commerce Clause was designed to prevent." *Id.*

185. For a discussion of the potential proliferation of takeover statutes and the eventual stifling of tender offers, see *supra* notes 174-77 and accompanying text.

186. *See infra* note 189 (discussion of the statute's purposes). The state interest in protecting local life styles finds support in Justice Powell's concurring opinion in *MITE.* Powell noted the adverse consequence that may occur when a corporate headquarters is relocated. *See MITE,* 457 U.S. at 646 & n.

> When corporate headquarters are transferred out of a city and State . . . the state and locality from which the transfer is made inevitably suffer significantly. Management personnel—many of whom have provided community leadership—may move to the new corporate headquarters. Contributions to cultural, charitable, and educational life—both in terms of leadership and financial support—also tend to diminish when there is a move of corporate headquarters.

Id.; see also Kidwell, 577 F.2d at 1282-83 (interest in benevolent management is a legitimate local interest).

187. *See supra* note 92 and accompanying text.

188. *Id.*

189. The expressed legislative purpose of the Act is to "assure that the impact of takeovers on all affected constituencies are identified and disclosed." Act of Apr. 25, 1984, ch. 488, 1984 Minn. Laws 470, 471. One sponsor of the bill argued that emphasis on protecting the shareholders ignored the larger "social responsibility to others not shareholders." *Small Business, supra* note 12 (statement by Ray Plank); *see generally* Norris, *supra* note 92 (social costs). Noting that takeovers affect the "community quality of life," the same sponsor emphasized the importance of allowing shareholders to choose by informed vote. *See Small Business, supra* note 12 (statement by Ray Plank).

190. *Cardiff,* 751 F.2d at 912.

191. To shareholders, other than those having some long-term personal attachment to a company, the relevant consideration is the premium over what they could get for their shares in the marketplace. In Corenco Corp. v. Schiavone & Sons, Inc., 488 F.2d 207 (2d Cir. 1973), the court noted that "ordinarily a stockholder receiving a tender offer is primarily interested in the cash price," with financial information concerning the offeror constituting "at best a secondary factor" in the stockholder's decision. *Id.* at 214; *see also* Fleischer, *General Disclosure Principles,* 32 BUS. LAW. 1365

In *MITE,* the Supreme Court was skeptical of any benefits arising from disclosure beyond that required by the Williams Act.[192] Because the Williams Act sets out what facts are relevant to an informed investment decision, additional disclosure offers only speculative benefits.[193] The Court has also warned that excessive disclosure causes more harm than good by confusing shareholders and obscuring relevant data.[194]

Given this skepticism, the *Cardiff* court should have viewed any putative benefits arising from shareholder awareness of local issues as speculative. Indeed, the decision to tender is an economic one, with disclosure of irrelevant data serving only to confuse resident shareholders. Rather than aid shareholders in appraising the value of tender offers, additional disclosure only increases the risk of delay,[195] thereby enhancing incumbent management's chances of blocking the takeover.[196]

C. *The Constitutional Infirmity of the 302A Amendments*

The constitutionality of the 302A amendments was not at issue in

(1977). Fleischer notes that "[disclosure in the takeover area] doesn't really make any difference. What people are interested in is the cash price." *Id.* at 1365; *see also* H. BLOOMENTHAL, *supra* note 2, at § 13.19[1] ("shareholders tend to find the premium price offered for their shares difficult to resist").

192. The *MITE* Court observed that Congress intended that the Williams Act "make the relevant facts known so that shareholders have a fair opportunity to make their decision." *MITE,* 457 U.S. at 639 (quoting H.R. REP. No. 1711, 90th Cong., 2d Sess. 4 (1968)); *see also Telvest,* 697 F.2d at 581 (federal securities law protections are adequate); *National City Lines,* 687 F.2d at 1131 (citing the "Williams Act's goal of unfettered choice by well-informed investors").

193. *MITE,* 457 U.S. at 645. The SEC has voiced its objection to the enactment of any federal law which would require disclosure of economic/community impacts resulting from takeovers. *See* Letter Memorandum of the Securities and Exchange Commission regarding H.R. 5693, as Amended and Ordered Reported by the House Committee on Energy and Commerce at 7-8 (SEC recommendations sent to John D. Dingell, Chairman of House Energy and Commerce Committee, Sept. 7, 1984) (on file at William Mitchell Law Review Office). The SEC concluded that community impact disclosure would be of questionable utility, requiring disclosure of information having "no bearing on the needs of investors." *Id.* at 8.

194. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448 (1976). In addressing the issue of adequate disclosure in a proxy solicitation, the *TSC* Court indicated that excessive disclosure requirements would induce those soliciting proxies in order to avoid liability for inadequate disclosure, "to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." *Id.* at 448-49; *see Kidwell,* 577 F.2d at 1280.

195. For a discussion of the risks of delay, see *supra* notes 22, 55 and accompanying text.

196. As the *MITE* Court noted, any benefit resulting from potential delays and added disclosure "may be outweighed by the increased risk that the tender offer will fail due to defensive tactics employed by incumbent management." *MITE,* 457 U.S. at 645; *see supra* note 66.

Cardiff because the target company was a foreign corporation. Had the issue arisen, however, the *Cardiff* court's rationale for upholding 80B would not apply to the 302A amendments.

In *Cardiff*, the Eighth Circuit upheld 80B on two grounds. First, 80B withstood constitutional challenge because it establishes a connection between its application and any putative local benefits.[197] The connection is created by requiring at least twenty percent of the target's shareholders to be state residents.[198] According to the *Cardiff* court, this distinguishes 80B from the Illinois statute which "appl[ied] even if none of the target's shareholders were Illinois residents."[199] Second, the disclosure requirements of 80B withstood attack because they "are primarily concerned with the impacts of the proposed takeover on Minnesota residents" and "while the state may not use the statute as a protectionist measure, it may require the offeror to inform Minnesota stockholders as to the impacts on the state or its residents of the takeover."[200] Again, 80B withstood attack because its application was linked to Minnesota residents. According to *Cardiff*, 80B's disclosure exposes the impact of takeovers on Minnesota and thereby aids the decisionmaking process of Minnesota shareholders.

These two justifications do not apply to the 302A amendments. Chapter 302A applies if the target is incorporated in Minnesota and has its principal place of business or substantial assets in Minnesota.[201] Unlike 80B, there is no requirement that twenty percent of the shareholders be Minnesota residents. Chapter 302A creates no connection between its application and any putative benefits inuring to Minnesota shareholders. An offeror must comply with 302A even where no shareholders reside in Minnesota. Consequently, *Cardiff's* first justification for upholding 80B is not applicable.

Similarly, the *Cardiff* court's rationale for defending 80B's disclosure does not apply to the disclosure required by 302A.[202] Under 302A, disclosure must be made to all shareholders whether or not they are residents.[203] Nonresident shareholders therefore receive information regarding the takeover's potential impact on Minnesota. In such a case there is no connection between the putative benefits of 302A's disclosure and Minnesota shareholders. The *Cardiff* court's rationale for defending 80B's disclosure, therefore, does not apply

197. *See supra* notes 131-34 and accompanying text.
198. *See* MINN. STAT. § 80B.01, subd. 9.
199. 751 F.2d at 911.
200. *Id.*
201. The target must also have 50 or more shareholders. MINN. STAT. § 302A.011, subd. 39.
202. The disclosure requirements in 302A are analogous to the 80B requirements. *See supra* note 110 and accompanying text.
203. *See* MINN. STAT. § 302A.671, subd. 3.

to 302A.[204]

The 302A amendments may be the focus of the next constitutional challenge to the statute. Like the Illinois statute invalidated in *MITE*, the 302A amendments apply to tender offers not involving a single Minnesota shareholder.[205] This lack of connection between 302A's application and any Minnesota residents distinguishes the *Cardiff* holding and provides a basis for invalidating Minnesota's takeover statute.[206]

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204. The district court's statement clearly exposes the flaw in applying the *Cardiff* court's holding to 302A. The district court upheld 80B's disclosure requirements, stating they were "pertinent disclosure[s] to Minnesota shareholders, *who unlike out of state investors*, may be very interested in the effect the tender offer will have on Minnesota." *Cardiff*, 597 F. Supp. at 1498 (emphasis in original).

205. Wisconsin has a takeover statute similar to the provisions set out in the 302A amendments. The Wisconsin statute is triggered when the target is incorporated under Wisconsin law and at least 100 of the target's shareholders are Wisconsin residents. *See* WIS. STAT. ANN. §§ 180.02(7m), 180.69 (West Supp. 1984).

206. Sponsors of the 302A amendments argue that these amendments are constitutional because "Minnesota has the dominant interest and exclusive right in legislating rules of governance for Minnesota corporations." Brief of Amicus Curiae, Minnesota Wellspring, In Opposition To Plaintiff's Application For Preliminary Injunction at 23, Edudata Corp. v. Scientific Computers, Inc., No. 4-84-968 (D. Minn. Oct. 17, 1984) (citing Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478-79 (1977)). The sponsor's argument is based on the concept that corporations owe their existence to state law and draw all of their powers from it. *See* Cort v. Ash, 422 U.S. 66 (1975). In *Cort*, the Supreme Court declared, "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." *Id.* at 84.

The Supreme Court has also expressed an interest in preventing federal security laws from unnecessarily intruding into the traditional area of state corporate law. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1977). It is thus arguable that the 302A amendments are safe from attack because they fall within the area of corporate governance, an area traditionally regulated by the states.

The 302A amendments can also be supported by the claim that permitting shareholders to vote on the proposed acquisition is analogous to other state legislation adopted to regulate a variety of corporate transactions. For example, when a merger is to be carried out between two publicly held corporations, state law provides the answers as to how the transaction must be accomplished and what participation shareholders are to have in approving it. *See* MINN. STAT. § 302A.613 (1985). Arguably, the 302A amendments provide the corporate method for concluding a tender offer acquisition.

The *MITE* Court rejected the argument that the takeover statute merely regulated the internal affairs of companies incorporated under Illinois law. The Court concluded that "tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company." *MITE*, 457 U.S. at 645 (citing *Kidwell*, 577 F.2d at 1280 n.53). In appraising the validity of the internal affairs justification for state regulation, the *Kidwell* court stated:

> Statutes regulating the internal affairs of a corporation concern the existing relationship between a corporation and its shareholders. Since at the begin-

Conclusion

By not following the teachings of *MITE* and its progeny, the *Cardiff* court's appraisal of 80B is flawed. Chapter 80B remains an undue burden on interstate commerce, depriving residents and nonresidents of the opportunity to participate in nationwide tender offers. The anti-takeover stance of 80B exists in its self-tender exception, the potential for delay in the hearing process, and the open-ended disclosure requirements. In attempting to protect Minnesota from the impact of federally regulated tender offers, the legislature has unconstitutionally burdened the tender offer process.

The legislature's oversight is not saved by the *Cardiff* court's myopic interpretation and defense of 80B. Nevertheless, *Cardiff* remains a significant decision.[207] Breathing new life into state regulation of tender offers, other states will undoubtedly view *Cardiff* as justifying creation of their own protectionist regulation.

> ning of a tender offer the offeror may be a potential shareholder only, laws governing the offeror's conduct are not logically based on control of internal corporate affairs.

Kidwell, 577 F.2d at 1280 n.53. The *Kidwell* court also noted that regulating the internal affairs of the resident target is quite different from regulating the tender offer of a corporation owing its creation to another state. *See id.*

207. The offeror in *Cardiff* eventually raised its offer price by seven dollars per share. St. Anthony, *Conwed board votes to accept higher bid*, Minneapolis Star & Trib., Feb. 9, 1985, at 1A, col. 1, 2. Based on this higher offer, Conwed's board voted to sell Conwed to Cardiff and urged shareholders to sell their shares. *Id.* at 10A, col. 1. Based on the probable success of this higher offer, the litigation has likely ended and the *Cardiff* decision will not be appealed.